RECORD, CASE No. 15,088.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1118.

PASSAVANT & CO., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED JULY 23, 1892.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., OCTOBER 10, 1892.

1 U. S. Circuit Court for the Southern District of New York.

In the Matter of the Application of PASSAVANT & Co. on Certain Merchandise Imported by Them and Entered by La Champagne on November 21, 1890, and July 13, 1891 (Three Protests).

To the circuit court of the United States for the southern district of New York:

The petitioners above named allege that they are now and at the times hereinafter named were copartners doing business under the firm name of Passavant & Co., said firm being composed of Fredericke S. Passavant, George W. Sutton, Gustav Kotzenberg, William Sandhagen, Heinrich Meyer, Arthur W. Watson, and Oscar Passavant.

That under such firm name they imported and entered at the port of New York certain merchandise, described in the schedule hereto annexed, at the times therein mentioned.

That thereafter the collector at that port caused the actual market value of said merchandise to be appraised and certain additional or penal duties to be assessed, levied, and collected thereon under the provisions of an act of Congress passed June 10, 1890, entitled "An act to simplify the laws in relation to the collection of the revenues."

That your petitioners, being dissatisfied with the appraisement thereof, within two days thereafter gave notice to said collector,
2 in writing, of such dissatisfaction, and said collector thereupon directed a reappraisement of such merchandise by one of the general appraisers.

That your petitioners, being dissatisfied with the decision of such general appraiser, within two days thereafter gave notice to said collector in writing of such dissatisfaction, and said collector thereupon transmitted the invoices and all papers appertaining thereto to the board of three general appraisers, which board has decided the case thus submitted.

That thereafter the collector at that port proceeded to ascertain, fix, and liquidate the rate and the amount of the duties to be paid on said merchandise as aforesaid and under the provisions of an alleged act of Congress entitled "An act to reduce the revenue and equalize duties on imports and for other purposes," and purporting to be approved on October 1, 1890, and also levied and collected certain additional or penal duties thereon, which rate and amount was in excess of the rate and amount required by law to be paid thereon under said act of October 1, 1890, and under statutes in force prior to October 1, 1890.

That your petitioners, being dissatisfied with the rate and amount so fixed, and within ten days after said determination of said collector, but not before said ascertainment and liquidation of duties, gave notice in writing to the collector, setting forth therein, distinctly and specifically in respect to each entry and payment, the

reasons for their objections thereto, and paid the full amount of the duties and charges ascertained to be due thereon.

3 That thereafter the collector transmitted the invoice and all the papers and exhibits connected therewith to the board of general appraisers, who, within the past thirty days and on the dates set forth in said schedule, returned that they had examined and decided as to the said entries and affirmed the decision of said collector.

That your petitioners are dissatisfied with said decision of said board as to the construction of the law and the facts respecting the market value and the classification of said merchandise and the rate of duty imposed thereon, and the following is a concise statement of the errors of law and fact complained of.

The errors of fact were as follows:

1. In holding that the alleged act of Congress entitled "An act to reduce the revenue and equalize duties on imports and for other purposes" and purporting to be approved October 1, 1890, ever passed the House of Representatives and Senate in manner and form as it now appears of record in the Department of State.

2. In holding that the bill, entitled as above, which passed the House of Representatives and Senate, was ever presented to the President, as required by the Constitution, or was ever signed or approved by him.

3. In holding that the dutiable value of said merchandise was greater than the amount mentioned in the invoices.

In refusing to find as follows, to wit:

4. That the appraising officers in advancing the value of said merchandise beyond the invoice value did not act in accordance with their own opinion, but acted upon the opinion of special agents of the Treasury or the previous findings of some of the general

4 appraisers and without regard to the evidence presented to them or obtained by examiners or appraisers or to the true market value of said goods, and that they took and acted upon the evidence of persons who were not experts and who had no personal knowledge of the value of said merchandise in the markets of France.

In refusing to find as follows, to wit:

5. That said appraisement and the additions made to the invoice value were not made in accordance with the judgment of the appraisers, but that in making said additions they acted upon compulsion and against their own judgment as to the value of said goods.

In refusing to find as follows:

6. That the assistant appraiser and examiner who examined and appraised said goods found their invoice value to be correct, and that the additions to value were made contrary to their judgment and in accordance with the orders of the appraiser at New York, who never himself saw, examined, or appraised said goods.

7. In holding that any proceedings have been had in accordance with the act approved June 10, 1890, in any way by which any legal reappraisement has been had in accordance with the terms of said act.

The errors of law were as follows:

1. In holding that the alleged act of 1890 is not unconstitutional and void by reason of the third section thereof.

2. That the alleged act of 1890 is not unconstitutional and void by reason of the provisions contained in section one and Schedule E and paragraph 231 of said act, relating to bounties on sugar.

5 3. In holding that said act had been passsed by the Senate and House of Representatives and signed by the President in accordance with the Constitution.

4. In holding that the merchandise in said entry and invoice referred to is dutiable under the alleged act of October 1, 1890, instead of being dutiable under the statutes in force prior to October 6th, 1890, viz., under the act of March 3, 1883, Schedule N, at the rate of fifty per cent. ad valorem.

5. In holding that said merchandise was liable for any additional or penal duty, and that duty should be assessed upon any greater amount or at any different rate than appeared upon said invoices and entries based thereon.

6. In holding that the action of the appraisers was not made under compulsion and in all respects null and void and not in accordance with the provisions of the act of June 10, 1890.

That the following is a schedule of the importations embraced in this petition, viz:

Description of merchandise.	Name of vessel.	Date of entry.	Date of protest.	Date of decision.
		1890.	1891.	1891.
Gloves	La Champagne	Nov. 21	Jan. 26	Sept. 28
"	"	Nov. 21	Feb. 27	" "
		1891.		
Leather gloves	"	July 13	Aug. 2	" "

6 Wherefore your petitioners pray that the said circuit court review the questions of law and fact involved in the decision of the said board of general appraisers heretofore made in each of the above matters as to the dutiable value, classification, and rate of duty assessed upon said merchandise, and for that purpose pray that an order may be entered requiring the said board of general appraisers to return to said circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in each of the above matters and their decisions thereon.

And your petitioners further pray for such additional orders and relief under the statutes of the United States in such cases made and provided as they may in the judgment of court be entitled to.

Dated New York, October 26, 1891.

PASSAVANT & CO., *Petitioners*,
By STANLEY, CLARKE & SMITH, *Attorneys*.

(Endorsed:) No. 603. U. S. circuit court, southern district of New York. In the matter of certain merchandise imported by Passa-

vant & Co. Application of importers. Stanley, Clarke & Smith, attorneys for petitioners, 120 Broadway, New York city. U. S. circuit court. Filed Oct. 27, 1891. John A. Shields, clerk.

7 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

In the Matter of the Application of PASSAVANT & Co. for a review of the questions of law and fact involved in the decision of the board of general appraisers at the port of New York upon the entry of certain merchandise by La Champagne, entered Nov. 21, 1890, and La Champagne, entered July 13, 1891.	603. Bond for Damages and Costs.

Know all men by these presents that I, Heinrich Meyer, member of the firm of Passavant & Co., am held and firmly bound unto the United States of America in the sum of fifty dollars, to be paid to the said United States of America; for the payment of which, well and truly to be made, I bind myself and my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal and dated the ninth day of October, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas the above-named applicants have applied or will apply to the circuit court of the United States for the southern district of New York for a review of the questions of law and fact involved in the decision of the board of general appraisers at the port of New York upon the entry of certain merchandise, as above mentioned:

Now, therefore, the condition of this obligation is such that if the above-named applicant- shall prosecute said matter, application, or proceeding to effect and pay all damages and costs if he or they shall fail to make said matter, application, or proceeding good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HEINRICH MEYER. [L. S.]

Sealed and delivered and taken and acknowledged this 9th day of October, 1891, before me—

[SEAL.] GEO. W. WRIGHT,
Notary Public, New York Co.

UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

Heinrich Meyer, being duly sworn, doth depose and say that he resides in the southern district of New York; that he is worth the sum of one hundred dollars over and above all his just debts and liabilities.

HEINRICH MEYER.

Sworn to this 9th day of October, A. D. 1891, before me—

[SEAL.] GEO. W. WRIGHT.

This bond is approved as to form and amount and sufficiency of surety.

Dated New York, Oct. 27th, 1891.

E. HENRY LACOMBE.

8 [Endorsed:] No. 603. U. S. circuit court, southern district of New York. In the matter of the application of Passavant & Co. for a review of the decision of the board of general appraisers on certain merchandise imported as within mentioned. Bond for damages and costs on application for review. Stanley, Clarke & Smith, attorneys for petitioner-, 120 Broadway, New York city. U. S. circuit court. Filed Oct. 27, 1891. John A. Shields, clerk.

9 At a stated term of the United States circuit court for the southern district of New York, held at the United States court and post-office building, in the city of New York, on the 27th day of October, 1891.

Present: Hon. E. Henry Lacombe, circuit judge.

In the Matter of the Application of PASSAVANT & Co. on certain merchandise imported by them and entered by La Champagne on November 21, 1890, and July 13, 1891, (three protests). } 603.

Upon reading and filing the petition and application herein, dated the 26th day of October, A. D. 1891, and upon motion of Stanley, Clarke & Smith, attorneys for the petitioners, it is—

Ordered that the board of general appraisers at the port of New York return to this court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decisions thereon respecting the dutiable classification of the merchandise embraced in said petition and application and the rate of duty imposed thereon, viz:

Description of merchandise.	Name of vessel.	Date of entry.	Date of protest.	Date of decision.
		1890.	1891.	1891.
Gloves	La Champagne	Nov. 21	Jan. 26	Sept. 28
Gloves	La Champagne	Nov. 21	Feb. 27	" "
		1891.		
Leather gloves	La Champagne	July 13	Aug. 2	" "

E. HENRY LACOMBE.

10 [Endorsed:] No. 603. U. S. circuit court, southern district of New York. In the matter of certain merchandise imported by Passavant & Co. Order upon the board of U. S. general appraisers. Due service of a copy hereof is hereby admitted this — day of ——, 1891. U. S. circuit court. Filed Oct. 27, 1891. John A. Shields, clerk. Stanley, Clarke & Smith, attorneys for petitioners, 120 Broadway, New York city.

To the board of general appraisers:

As to the facts involved in the within specified case, you are hereby notified that the petitioners will present to you evidence at such time and place as you may designate, reasonable notice of such designation being given to their attorneys.

STANLEY, CLARKE & SMITH,
120 *Broadway, New York City.*

11 *Return of the Board of United States General Appraisers to the Order of Hon. E. Henry Lacomb. Dated New York, March 1st, 1892.*

In the Circuit Court of the United States for the Southern District of New York.

In the Matter of the Application of PASSAVANT & Co. for a Review of the Decision of the General Appraisers as to the Rate and Amount of Duty on Certain Merchandise Imported by them per La Champagne Nov. 21, 1890. Suit No. 603.

The board of United States general appraisers, sitting at New York, in response to the order of the court in the above matter, make the following return of the record and evidence taken by them in the above matter, and of the facts involved therein as ascertained by them:

They state that on the 25th day of February, 1891, a letter dated Feb. 21, which is hereto annexed and marked Exhibit "A," was received from the collector of customs at New York, submitting under the provisions of sec. 14 of the act of June 10, 1890, the protest described and marked as follows: Exhibit "B."

Collector's No., 3784.
Board No., 6617 A.
Protester, Passavant & Co.
Vessel, La Champagne.
Date of entry, Nov. 22, '90.
12 Rec'd Feb. 25, '91.

EXHIBIT A.

CUSTOM-HOUSE, PORT OF NEW YORK,
COLLECTOR'S OFFICE. *Feb.* 21, 1891.

Hon. board of U. S. gen'l appraisers at the port of New York:

GENTLENEN: I submit the protest of Passavant & Co., No. 3800–3784, from assessment of duty by this office on certain so-called "leather gloves" imported by them in the Champagne Nov. 22, '90.

I have to state that duty was assessed upon the value of the goods, as returned by the reappraising officers. The additional duty under section 7 of the act of June 10, '90, was assessed upon only three items that were advanced by the reappraising officers to a value that exceeded by more than 10% the value of the same as declared by the importers upon entry. In view of section 13 of the act of June 10, '90, it would appear that the protesters had exhausted their

remedy by appeal for reappraisement. As to the constitutionalty of the act of Oct. 1,'90, referred to in protest 3809, reference is made to G. A., 203 and 286.

I have to report that the claiments have complied with the requirements of section 14 of the act of June 10, '90.

The naval offices concurs in the decision of this office.

The entry and invoicer covered by the above-named protests are enclosed herewith.

(4 inclosures.)

Respectfully yours, J. J. COUCH,
Special Deputy Collector.

13 6617 A.

"EXHIBIT B."

NEW YORK, *January 26th*, 1891.

Hon. Joel B. Erhardt, collector of customs.

SIR: We hereby protest against your decision, liquidation, and assessment of duty at all excess above the rate of fifty per cent. and against assessment of duty upon any greater value than francs 30,255 on our importation of gloves, marks and No., T. C. 165–169; vessel, La Champagne; entered November 21, 1890; entry No. 190,327; entry liquidated January 16, 1891.

We further notify you that we are dissatisfied with your decision as to the rate and amount of duties exacted on the entry above referred to, and the reasons of our objections thereto are:

1st. That the appraiser found the invoice value of said goods to be correct and that you have assessed duty upon an increased value on said goods or a portion thereof and have also assessed a penal or additional duty thereon beyond fifty per cent. or the rate authorized by law.

2nd. That no proceedings have been had in accordance with the act approved June 10th, 1890, by you or in any way by which any legal reappraisement has been had in accordance with the terms of said act, nor has the return of the appraiser affirming the value of our invoice ever been changed or set aside according to law.

3rd. That upon an alleged reappraisement upon said importation held by order of the collector, one of the board of general
14 appraisers who acted thereon declined to receive or entertain evidence offered by us as to the true market value of said goods.

4th. Said general appraiser acted and determined said case upon values given him by special agents of the Treasury and without regard to the evidence presented to him.

5th. That he took and acted upon the evidence of persons who were not experts and who had no personal knowledge of the value of kid gloves in the markets of France.

6th. That upon the appeal herein to the board of general appraisers by us said board acted and were governed in the same manner as hereinbefore set forth and we make each of said objections to the action of said board.

7th. Said board of general appraisers after hearing us informed us that the case was closed and that they would make an immediate decision, and that thereupon they proceeded to reopen said hearing and to take other testimony and to hear arguments and statements from special agents of the Treasury and others without notice to us and without giving us an opportunity to controvert and show the falsity of said evidence and statements.

8th. That said board in returning to the collector the value of said goods did not act upon the evidence before them.

9th. That in all respects the action of said board was illegal and not in accordance with the provisions of the act of June 10th, 1890, and that the original invoice as found by the appraiser to be correct was correct and duties should not be assessed upon any greater amount or at any different rate as appeared upon said in-
15 voice and our entry based thereon.

We pay said duties under compulsion and to obtain possession of our goods, and claim refund of the sum exacted in excess of the duty legally accruing.

Respectfully, PASSAVANT & CO.

(Endorsed:) 3784. 6617 A. Passavant & Co., Champagne, re-app't. 3661 po. Vessel, c. Champagne; entry, 1890, Nov. 22; liq'ed, 1891, Jan. 16; protested, 1891, Jan. 26. Custom-house, New York, Jan. 26, 1891, received.

That on the 28 day of September, 1891, the board of general appraisers rendered its decision in the matter of said protest No. 6617 A, a copy of which is hereto annexed, marked "Exhibit C."

EXHIBIT C.

(G. A. 899.)

Protests Against Reappraisement.

Before the U. S. General Appraisers at New York, September 28, 1891.

In the Matter of the Protests 6616 A, 6617 A, and 14108 A, of Messrs. PASSAVANT & Co. against the Decision of the Collector of Customs at New York as to the Rate and Amount of Duties Chargeable on Certain Leather Gloves, Imported per Champagne November 22, 1890, and July 14, 1891.

Opinion by Somerville, General Appraiser.

We find in cases Nos. 6616 and 6617 A that the merchan-
16 dise has been appraised by the local appraisers at the port of New York, and was afterwards reappraised by one of the general appraisers on the expression of dissatisfaction on the part of the appellants; that an appeal was taken by them to the board of three general appraisers on duty at said port of New York, who, after fixing a day and giving reasonable notice thereof to said importers or consignees, examined and decided the said case after an appearance

made by the appellants, and that the said board determined the dutiable value of the merchandise in each of said cases.

We find said proceedings to have been regular in all respects.

Section 13 of the act of June 10, 1890, declares the decision of said board of appraisers to be "final and conclusive as to the dutiable value of such merchandise." This decision cannot, therefore, be impeached at all by protest before the collector, or even before the courts, except on the ground that the appraising officers acted with fraud in the rendition of their judgment or without the limits of the power conferred on them by the statute. (Oelbermann *vs.* Merritt, 123 U. S., 356; Auggmordt's case, 11 Sup. Ct. Rep., 103; Morgan's U. S. Tariff, pp. 173, 174.)

In case No. 14108 A we find that the merchandise was appraised by the local appraiser, who made certain advances in the market value of the goods, and that the appellants failed to call for a reappraisement as they were authorized to do by section 13 of the act of June 10, 1890, and in the absence of which action on their part said decision is made final and conclusive by law.

17 The appellants were served with reasonable notice of these several hearings after a day fixed therefor and were cited to appear before this board and offer evidence to sustain the contentions of fact alleged in the grounds of their protests. This they failed to do, and the board accordingly adjudges all of said issues against them as confessedly untrue.

The decision of the collector in each case is affirmed.

GEORGE C. TICHENOR,
HENDERSON M. SOMERVILLE,
WILBUR F. LUNT,
Board of U. S. Gen'l Appraisers.

The entry & invoices received with these protests are herewith returned.

And for a certified statement of the facts involved in said matter, as ascertained by them, the said board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said board than such as are shown by said decision and other exhibits hereto attached.

HENDERSON M. SOMERVILLE,
GEO. C. TICHENOR,
THAD. S. SHARRETTS,
Board of U. S. General Appraisers.

18 (Endorsed:) No. 603. U. S. circuit court, southern district of New York. In the matter of the appeal of Passavant & Co. from the decision of the general appraisers as to importations by them per Champagne, Nov. 21, '90. Return of record, evidence, and facts by board of U. S. general appraisers. U. S. circuit court. Filed Mar. 2, 1892. John A. Shields, clerk.

19 U. S. Circuit Court, Southern District of New York.

In the Matter of the Application of PASSAVANT & Co. for a Review of the Decision of the General Appraisers on Certain Merchandise Imported by them per "La Champagne" Nov. 21, 1891. Suit No. 603.

SIRS: Please take notice that on the return of the board of U. S. general appraisers, filed herein on the 2nd day of March, 1892, and on the proceedings herein, a motion will be made before this court, at a stated term thereof to be held in the U. S. court and post-office building, in the city of New York, in the southern district of New York, on Friday, the first day of April, 1892, at 11 o'clock a. m., or as soon thereafter as counsel can be heard, for an order dismissing the appeal or application for a review herein for want of jurisdiction.

Dated March 25, 1892.

Yours, &c., EDW'D MITCHELL,
U. S. Attorney, for the Collector and United States.

To Stanley, Clarke & Smith, Esqs., attorneys for importers, 120 Broadway, N. Y. city.

(Endorsed:) 603. U. S. circuit court, southern district of
20 New York. In matter of application of Passavant & Co. concerning certain mdse. imported per La Champagne Nov. 21, 1890. Notice of motion. Edward Mitchell, United States attorney, attorney for collector. Due service of a copy of the within is hereby admitted. New York, March 25th, 1892. Stanley, Clarke & Smith, attorneys for importers. To Stanley, Clarke & Smith, Esqs, attorneys importers. The object of this proceeding is plainly to review the decision of the appraisers as to value. Whether or not any relief can be secured by an importer where there has been fundamental error in fixing the value, it does not seem to be provided for under the administrative act. Motion to dismiss granted. May 18, 1892. E. H. Lacombe. U. S. circuit court. Filed May 18, 1892. John A. Shields, clerk.

21 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States circuit court rooms, in the post-office building, in the city of New York, on the 18th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Present: The Honorable E. Henry Lacombe, circuit judge.

In the Matter of the Application of PASSAVANT & Co. for a Review of a Decision of the General Appraisers as to the Rate and Amount of Duty on Certain Merchandise Imported by them per La Champagne, November 21, 1890. Suit "A." No. 603.

The motion in the above cause to dismiss the appeal or proceeding for a review by the U. S. circuit court of the questions of law and fact involved in the decisions of the board of U. S. general ap-

praisers therein for want of jurisdiction coming on for hearing and determination, on notice of motion and admission of service thereof and on the return of the board of general appraisers filed March 2, 1892:

Now, after hearing Henry C. Platt, assistant U. S. attorney, for said motion, and Stephen G. Clarke, Esq., counsel for the said importers, in opposition thereto, on motion of Edward Mitchell, U. S. attorney, it is ordered that said motion be granted, and the said appeal or proceedings for review taken by the importers, Passavant &
22 Co., herein be, and the same are hereby, dismissed for want of jurisdiction.

E. HENRY LACOMBE.

(Endorsed:) "A." Suit No. 603. U. S. circuit court, southern district of New York. In the matter of Passavant & Co. concerning merchandise imported per La Champagne Nov. 21, '90. Order dismissing appeal for want of jurisdiction. Edward Mitchell, United States attorney, attorney for collector. U. S. circuit court. Filed May 19, 1892. John A. Shields, clerk.

23 U. S. Circuit Court, Southern District of New York.

In the Matter of the Protests $\frac{6616\text{ A}}{3800}$, $\frac{6617\text{ A}}{3784}$, & $\frac{14108\text{ A}}{37119}$ of Messrs. PASSAVANT & Co. against the Decision of the Collector of Customs at New York as to the Rate and Amount of Duties Chargeable on Certain Leather Gloves Imported per Champagne Nov. 22, 1890, and July 14th, 1891. No. 603.

GENTLEMEN: Please take notice that on the accompanying affidavit of Stephen G. Clarke and on your return, heretofore made herein, we shall move this court, at a stated term thereof to be held in the U. S. court and post-office building, in the city of New York, on Friday, the 25th day of March, 1892, at 11 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order directing you to return to this court the evidence heretofore taken by you in this matter.

Yours, &c., STANLEY, CLARKE & SMITH,
Att'ys for Importers, 120 *Broadway, N. Y. City.*

To the board of U. S. general appraisers, 534 Canal street, N. Y. city.

24 U. S. Circuit Court, Southern District of New York.

In the Matter of the Protests $\frac{6616\text{ A}}{3800}$, $\frac{6617\text{ A}}{3784}$, & $\frac{14108\text{ A}}{37119}$ of Messrs. PASSAVANT & Co. against the Decision of the Collector of Customs at New York as to the Rate and Amount of Duties Chargeable on Certain Leather Gloves Imported per Champagne Nov. 22, 1890, and July 14th, 1891. 603.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Stephen G. Clarke, being duly sworn, says that he is one of the attorneys for the importers in the above-entitled matter; that on the 28th day of September, 1891, a decision was rendered by the board of U. S. general appraisers at this port overruling the protests of the importers herein and affirming the decisions of the collector.

That thereafter and on the 26th day of October, 1891, an application was duly filed by the importers herein in this court alleging the grounds of their dissatisfaction with said decision of the board, and on the same day an order was duly made by this court that said board of general appraisers at the port of New York return to this court the record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decisions thereon, respecting the dutiable classification of the merchandise embraced in said petition and application and the rate of duty imposed thereon.

25 That in accordance with said order said board of appraisers did, on the 2nd day of March, 1892, make a return to this court, but failed to include therein the evidence taken by them upon the reappraisement proceedings previously had, first before one member of said board and then before three members of said board, upon the question of the proper valuation and appraisement of the merchandise covered by these protests, and afterwards was offered in support of the protests themselves.

That said testimony bears directly upon the questions presented by said protests and should have been included in the return made to this court in this matter, but is not.

STEPHEN G. CLARKE.

Sworn to before me this 18th day of March, 1892.

BENJAMIN BARKER, JR.,
Notary Public, N. Y. County.

(Endorsed:) No. 603. U. S. circuit court, southern district of New York. In the matter of the protests $\frac{6616\text{ A},}{3800}$ $\frac{6617\text{ A},}{3784}$ & $\frac{14108\text{ A}}{37119}$ of Messrs. Passavant & Co. against the decision of the collector of customs at New York as to the rate and amount of duties chargeable on certain leather gloves imported per Champagne Nov. 22, 1890, and July 14th, 1891. Affidavit and notice of motion. Stanley, Clarke & Smith, attorneys for importers, 120 Broadway, N. Y. city. A copy of the within paper has been this day received
26 at this office. Mar. 10, 1892. Edward Mitchell, U. S. attorney. J. R. Lake, chief clerk board gen'l app'rs. U. S. circuit court. Filed May 18, 1892. John A. Shields, clerk.

27 Circuit Court of the United States, Southern District of New York.

In the Matter of the Application of PASSAVANT & Co. on Certain Merchandise Imported by them and Entered by La Champagne on November 21, 1890, and July 13, 1891 (Three protests).

Upon the foregoing petition and the motion of the U. S. attorney for said district to dismiss the same for want of jurisdiction, the question arose as to the jurisdiction of the court to hear and determine, upon the evidence to be adduced in support thereof, these allegations of said petition, to wit:

That the board of general appraisers erred—

(3.) In holding that the dutiable value of said merchandise was greater than the amount mentioned in the invoice and in refusing to find—

(4.) That the appraising officers in advancing the value of said merchandise beyond the invoice value did not act in accordance with their own opinion, but acted upon the opinion of special agents of the Treasury or the previous findings of some of the general appraisers and without regard to the evidence presented to them or obtained by examiners or appraisers or to the true market value of said goods, and that they took and acted upon the evidence of persons who were not experts and who had no personal knowledge of the value of said merchandise in the markets of France.

(5.) That said appraisement and the additions made to the invoice value were not made in accordance with the judgment of the appraisers, but that in making said additions they acted upon compulsion and against their own judgment as to the value of said goods.

(6.) That the assistant appraiser and examiner who examined and appraised said goods found their invoice value to be correct, and that the additions to value were made contrary to their
28 judgment and in accordance with the orders of the appraiser at New York, who never himself saw, examined, or appraised said goods.

(7.) In holding that any proceedings have been had in accordance with the act approved June 10, 1890, in any way by which any legal reappraisement has been had in accordance with the terms of said act.

And that said board of general appraisers also erred—

(5.) In holding that said merchandise was liable for any additional or penal duty, and that duty should be assessed upon any greater amount or at any different rate than appeared upon said invoices and entries based thereon.

(6.) In holding that the action of the appraisers was not made under compulsion and in all respects null and void and not in accordance with the provisions of the act of June 10, 1890.

The circuit court granted the motion to dismiss and determined upon the question presented that it had no jurisdiction to enter upon, hear, and decide the issues sought to be raised by the afore-

said allegations of said petition, and now certifies this jurisdictional question to the Supreme Court of the United States, under the fifth section of the act of March 3, 1891, chapter 517 (26 Statutes, 827, bottom).

E. HENRY LACOMBE.

(Endorsed:) No. 603. U. S. circuit court, southern district of New York. In the matter of the application of Passavant & Co. on certain merchandise imported by them and entered by La Champagne on November 21, 1890, and July 13, 1891. Certificate. Stanley, Clarke & Smith, attorneys for appellants, 120 Broadway, N. Y. city. U. S. circuit court. Filed Jun- 9, 1892. John A. Shields, clerk.

29 United States Circuit Court, Southern District of New York.

In the Matter of the Application of PASSAVANT & Co. on Certain Merchandise Imported by them and Entered by La Champagne on November 21, 1890, and July 13, 1891 (Three Protests). No. 603.

Please take notice that the undersigned, on behalf of the importers, hereby appeal from the decision of this court rendered herein and entered on the 18th day of May, 1892, to the Supreme Court of the United States.

Dated New York, June 9th, 1892.

Yours, &c., STANLEY, CLARKE & SMITH,
Attorneys for Importers, No 120 Broadway, New York City.

To Edward Mitchell, Esq., U. S. district attorney for the southern district of N. Y.

(Endorsed:) No. 603. U. S. circuit court, southern district of New York. In the matter of the application of Passavant & Co. on certain merchandise imported by them and entered by La Champagne on November 21, 1890, and July 13, 1891. Notice of appeal. Stanley, Clarke & Smith, attorneys for appellants, 120 Broadway, N. Y. city. A copy of the within paper has been this day received at this office. Jun- 10, 1892. Edward Mitchell, U. S. attorney. U. S. circuit court. Filed Jun- 10, 1892. John A. Shields, clerk.

30 U. S. Circuit Court, Southern District of New York.

In the Matter of the Application of PASSAVANT & Co. on Certain Merchandise Imported by them and Entered by La Champagne on November 21, 1890, and July 13, 1891 (Three Protests).

To the honorable the Supreme Court of the United States:

The appeal of Passavant & Co., the above-named petitioners and appellants, respectfully showeth—

That upon the 27th day of October, 1891, the above-named Passavant & Co. filed their petition and application in the circuit court of the United States for the southern district of New York for a review of the questions of law and fact involved in the decision of

the board of general appraisers in respect to the duties to be assessed upon their importations by the vessels above specified.

That on the 18th day of May, 1892, a final decree was made and pronounced dismissing the petition and application of the importers.

Wherefore these appellants appeal from the judgment of the said circuit court of the United States dismissing their appeal or proceedings for review and respectfully pray that said circuit court may certify to the Supreme Court of the United States without
31 delay the question of the jurisdiction of said circuit court, and that the said Supreme Court will proceed to hear the said matter so certified, and that the said decree of the circuit court may be reversed.

Dated June 9th, 1892.

STANLEY, CLARKE & SMITH,
Attorneys for Appellants.

The foregoing appeal is allowed.

E. HENRY LACOMBE,
Circuit Judge.

(Endorsed:) No. 603. U. S. circuit court, southern district of New York. In the matter of the application of Passavant & Co. on certain merchandise imported by them and entered by La Champagne on November 21, 1890, and July 13, 1891. Appeal. Stanley, Clarke & Smith, attorneys for appellants, 120 Broadway, N. Y. city. A copy of the within paper has been this day received at this office. Jun- 10, 1892. Edward Mitchell, U. S. attorney. U. S. circuit court. Filed Jun- 10, 1892. John A. Shields, clerk.

32 Supreme Court of the United States.

In the Matter of the Application of Passavant & Co. on Certain Merchandise Imported by them and Entered by La Champagne on November 21, 1890, and July 13, 1891 (Three Protests). No. 603.

Assignment of Errors.

The appellants, plaintiffs, assign for error—

(1.) The dismissal of their petition and suit.

(2.) The ruling that the circuit court had no jurisdiction in the premises and over the matters presented to it, as stated in the certificate of the court.

STANLEY, CLARKE & SMITH,
Attorneys for Appellants, 120 Broadway, New York.

(Endorsed:) U. S. Supreme Court. In the matter of the application of Passavant & Co. on certain merchandise imported by them and entered by La Champagne on November 21, 1890, and July 13, 1891. Assignment of errors. Stanley, Clarke & Smith, attorneys for appellants, 120 Broadway, N. Y. city. A copy of the within paper has been this day received at this office. Jun- 10, 1892. Edward Mitchell, U. S. attorney. U. S. circuit court. Filed Jun- 10, 1892. John A. Shields, clerk.

33 Supreme Court of the United States.

In the Matter of the Application of PASSAVANT & Co. on Certain Merchandise Imported by them and Entered by La Champagne on November 21, 1890, and July 13, 1891 (Three Protests). "A." Suit No. 603.

The collector of customs at the port of New York comes into court and says that there is no error either in the proceedings or in the giving of the judgment aforesaid; and he prays that the said Supreme Court may proceed to examine as well the proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed.

EDWARD MITCHELL,
U. S. Attorney for the Above-Named Collector, Appellee.

(Endorsed:) "A." Suit No. 603. Supreme Court of the United States. In the matter of the application of Passavant & Co. as to certain importations per La Champagne Nov. 21, 1890, & July 13, 1891. Joinder in error. Edward Mitchell, U. S. attorney, attorney for appellee. Due service of a copy of the within joinder in error is hereby admitted. Dated New York, June 11, 1892. Stanley, Clarke & Smith, attorneys for appellants. To Stanley, Clarke & Smith, attorneys for appellant. U. S. circuit court. Filed Jun- 10, 1892. John A. Shields, clerk.

34 *Bond for Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

In the Matter of the Appeal of PASSAVANT & Co. on Certain Merchandise Imported by them and Entered by La Champagne on November 21, 1890, and July 13, 1891 (Three Protests).

Know all men by these presents that we, Heinrich Meyer and Eugene D. Sutton, are held and firmly bound unto the United States of America in the sum of two hundred and fifty dollars, to be paid to the said United States of America; for the payment of which, well and truly to be made, we bind ourselves and our heirs, executors, and administrators firmly by these presents.

Sealed with our seals and dated the eighth day of June, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas the above-named applicants have appealed to the Supreme Court of the United States from the judgment of this court in the matter of the application of Passavant & Co. on certain merchandise imported by them and entered by La Champagne on November 21, 1890, and July 13, 1891:

Now, therefore, the condition of this obligation is such that if the above-named appellants shall prosecute said appeal to effect
35 and pay all costs if they shall fail to make said appeal good,

then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HEINRICH MEYER. [SEAL.]
EUGENE D. SUTTON. [SEAL.]

Sealed and delivered and taken and acknowledged this 8th day of June, 1892, before me—

[SEAL.] GEO. W. WRIGHT,
Notary Public, Kings County.

Certf. filed in New York Co.

UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

Heinrich Meyer and Eugene D. Sutton, being duly sworn, each for himself deposes and says that he resides in the southern district of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

HEINRICH MEYER.
EUGENE D. SUTTON.

Sworn to this 8th day of June, A. D. 1892, before me—

[SEAL.] GEO. W. WRIGHT,
Notary Public, Kings Co.

Certf. filed in New York Co.

This bond is approved as to form and amount and sufficiency of surety.

Dated New York, June 9th, 1892.

E. HENRY LACOMBE.

(Endorsed:) No. 603. U. S. circuit court, southern district of New York. In the matter of the application of Passavant & Co. on certain merchandise imported by them and entered by La Champagne on November 21, 1890, and July 13, 1891. Bond. Stanley, Clarke & Smith, attorneys for appellants, 120 Broadway, N. Y. city. U. S. circuit court. Filed Jun- 9, 1892. John A. Shields, clerk.

36 UNITED STATES OF AMERICA, ss:

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the ninth day of July, eighteen hundred and ninety-two, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Passavant & Co. are appellants, to show cause, if any there be, why the judgment in the said appeal mentioned should not be reversed, modified, or corrected, and speedy justice should not be done to the parties in that behalf.

Dated June 9th, 1892.

Given under my hand, at the city of New York, in the southern district of New York, in the second circuit, the 9th day of June, 1892.

E. HENRY LACOMBE,
Circuit Judge.

(Endorsed:) No. 603. U. S. circuit court, southern district of New York. In the matter of the application of Passavant & Co. on certain merchandise imported by them and entered by La Champagne on November 21, 1890, and July 13, 1891. Citation. Stanley, Clarke & Smith, attorneys for appellants, 120 Broadway, N. Y. city. A copy of the within paper has been this day received at this office. Jun- 10, 1892. Edward Mitchell, U. S. attorney. U. S. circuit court. Filed Jun- 10, 1892. John A. Shields, clerk.

37 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to thirty-six, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the matter of the application of Passavant & Co. on certain merchandise imported by them and entered by La Champagne on Nov. 21, 1890, and July 13, 1891 (three protests), suit No. 603, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the said United States the one hundred and sixteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: Case No. 15,088. S. New York C. C. U. S. Term No., 1118. Passavant & Co., appellants, *vs.* The United States. Filed July 23d, 1892.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

FREDERICKE S. PASSAVANT *et alii* (PASSAVANT & CO.), Appellants, AGAINST THE UNITED STATES.	No. 1118.

The importance of this case touching the administration of the customs-revenue laws, in its effect upon the rights of importers and the proper discharge of official duties, extenuates the submission of a brief so voluminous, with such extensive citation and quotation of familiar authorities; intended to display the course of earlier tariff legislation and construction, as indicating the true meaning of the customs-administrative act of June 10, 1890.

Statement.

The individuals mentioned in the record (p. 1) as jointly doing business under the name of Passavant & Company, as a firm, imported into New-York some gloves, which the collector caused to be appraised, and levied additional and penal duties thereon. *(Id.)* The importers, being dissatisfied with the appraisement, a reappraisement was had, before a general appraiser, of

several invoices. This being also unsatisfactory, the matter was submitted to a board of three general appraisers, which decided the matter thus submitted. *(Id.)* Dissatisfied with the decision of the board as to the construction of the law and facts respecting the market-value and classification of their merchandise, the importers applied to the Circuit Court for a review of the case, all formalities being duly and seasonably complied with. *(Id.* pp. 1, 8 and 9.)

The Circuit Court held that the petition stated no ground for its taking jurisdiction, and dismissed the petition, certifying to this Court the question which arose with relation to the same, as follows;—

Upon the foregoing petition and the motion of the U. S. attorney for said district to dismiss the same for want of jurisdiction, the question arose as to the jurisdiction of the court to hear and determine, upon the evidence to be adduced in support thereof, these allegations of said petition, to wit:

That the board of general appraisers erred—

(3.) In holding that the dutiable value of said merchandise was greater than the amount mentioned in the invoice and in refusing to find—

(4.) That the appraising officers in advancing the value of said merchandise beyond the invoice value did not act in accordance with their own opinion, but acted upon the opinion of special agents of the Treasury or the previous findings of some of the general appraisers and without regard to the evidence presented to them or obtained by examiners or appraisers or to the true market value of said goods, and that they took and acted upon the evidence of persons who were not experts and who had no personal knowledge of the value of said merchandise in the markets of France.

(5.) That said appraisement and the additions made to the invoice value were not made in accordance with the judgment of the appraisers, but that in making said additions they acted upon compulsion and against their own judgment as to the value of said goods.

(6.) That the assistant appraiser and examiner who examined and appraised said goods found their invoice value to be correct, and that the additions to value were made contrary to their judgment and in accordance with the orders of the appraiser at New York, who never himself saw, examined, or appraised said goods.

(7.) In holding that any proceedings have been had in accordance with the act approved June 10, 1890, in any way by which any legal reappraisement has been had in accordance with the terms of said act.

And that said board of general appraisers also erred

(5.) In holding that said merchandise was liable for any additional or penal duty, and that duty should be assessed upon any greater amount or at any different rate than appeared upon said invoices and entries based thereon.

(6.) In holding that the action of the appraisers was not made under compulsion and in all respect null and void and not in accordance with the provisions of the act of June 10, 1890.

The circuit court granted the motion to dismiss and determined upon the question presented that it had no jurisdiction to enter upon, hear, and decide the issues sought to be raised by the aforesaid allegations of said petition, and now certifies this jurisdictional question to the Supreme Court of the United States, under the fifth section of the act of March 3, 1891, chapter 517 (26 Statutes, 827, bottom).

In addition to this certification, a regular appeal was taken and allowed from the judgment of dismissal. (Rec. 15.)

Assignment of Errors.

It is supposed to be unnecessary to assign error, where the Circuit Court certifies a question of jurisdiction; but it can do no harm, and is safer than to omit it, and easier than to examine into the subject of its necessity.

The appellants assign as error (Rec. 15),

1st. The dismissal of their petition and suit. (Rec. 10, 13, 14.)

2d. The ruling that the Circuit Court had no jurisdiction in the premises, and over the matters presented to it; as stated in the certificate of the Court. (*Id.* 13, 14.)

POINTS.

I.

Preliminary.

Our petition was dismissed as stating no case over which the Circuit Court has jurisdiction. Giving to the language of the application its widest scope, and admitting every inference to be drawn therefrom, if there be any statements therein directly or inferentially made, which would show a matter over which that Court has jurisdiction, the ruling was erroneous.

"The sufficiency and *scope* of pleadings . . . . are matters in which the circuit courts of the United States are governed by the practice of the courts of the State," etc.

Glenn v. Sumner, 130 U. S. 156.
Bond v. Dustin, 112 *Id.* 604.

There is no difference, in this respect, between state and federal tribunals, that whatever is implied in an averment is to be taken as if the thing were directly averred; and the objection that any pleading is indefinite or argumentative cannot be taken advantage of by a motion to dismiss. Too technical a construction will not be adopted to deprive this court of power to correct an error actually committed.

Dunlap v. No. E., 130 U. S. 655.
Marie v. Garrison, 83 N. Y. 28, 29.
Olcott v. Carroll, 39 *Id.* 436.

II.

Basis of Petition.

Our petition presents two independent grounds of complaint; one that the *appraisements* were illegal, and the other that the *penalty* was illegally exacted.

The first may be considered in a twofold aspect, as a subject of review;—firstly, as illegal *per se*, as a basis for the enhancement of the statutory amount upon the proper classification of the imported articles;—and, secondly, as a step in the *evidence* to prove the *penalty* to be illegally exacted.

III.

Illegal Appraisal.

The error (3) in the proceedings of the Board of General Appraisers which is at the head of the circuit court's certificate (Rec. 13) is not *simply* "in holding

that the dutiable value of said merchandise was greater than the amount mentioned in the invoice" but, as alleged in the next assignment (4) in so holding, and in making the advance, *not* in accordance with their own opinion and "*without regard to the evidence*" (whether obtained by the examiners or appraisers) "*or to the* TRUE *market value*," etc. ;—also, that they took and acted upon the testimony of persons having no knowledge of the ultimate fact to be ascertained and declared, or of aught pertinent thereto. (Rec. 13, § 4.)

In the importation of dutiable merchandise, as in most commercial dealings in which the question of value arises, the invoice is primarily the document of fundamental consequence and chiefly relied upon to ascertain it.

U. S. v. 67 Pack's. 17 How. *92.

It is the *prima facie* evidence of value in insurance and other commercial suits.

Graham v. Pa. I. Co. 2 Wash. 124.
Field v. Moulson, *Id.* 155.
LeRoy v. Un. I. Co. 7 Johns. 354.
Sturm v. Wms. 6 J. & S. 342.
Plank v. Gavila, 3 C. B. (N. S.) 806.

In all these cases, as in the administration of the customs laws, its statement of value is liable to be controlled, in a lawful manner and by proper evidence —but not otherwise.

Especially is this true with respect to the ascertainment of an *ad valorem* duty upon imported merchandise.

This is as much the case now as when Judge HOPKINSON referred to the fact when construing the act of May 28, 1830 :—

Every direction given to the Collector supposes and requires him to have the invoice before him. He cannot take a step in performance of the duties imposed

upon him, he cannot comply with one of the requisitions of the act, without it.

U. S. v. 28 Pckgs., Gilpin, 323.
See R. S., Secs. 2837 to 2839; 2852 to 2860; 2862 to 2865; 2899 to 2902; 2921; 2926; 2939.

These and many other sections and provisions of law indicate that it is substantially as true now as when Daniel Webster took note of it, in his tariff speech of May 9, 1828, that

Ad valorem duties, from the commencement of the government, have been estimated by reference to the invoice, as fixing the value at the place whence imported. When not suspected to be false or fraudulent the *invoice* is the regular proof of value.

3 Webster's Works, 233,
italicized as here,
Tappan v. U. S., 2 Mason, 402, top.

This invoice value *must* be the basis of duty, unless some other valuation is arrived at *in the manner prescribed by law.* A value determined any otherwise than by the statutory method will not "displace that declared upon the entry." (20 How., 576.)

The Courts have always held, that the appraiser must follow the Statute in respect to ascertaining these values, or his action be illegal.

Manhattan v. Maxwell, 2 Blatch., 408.
Morlot v. Lawrence, 3 Id., 123.
Vaccari v. Maxwell, *Ib.* 377, close of Op.
Wilson v. Maxwell, 2 *Id.*, 319.
Gray v. Lawrence, 3 Id., 117.
Reiss v. Redfield, 4 Id., 382.
Arthur v. Goddard, 96 U. S., 145.
Oelberman v. Merritt, 123 *Id.*, 356.
Badger v. Cusimano, 130 *Id.*, 39.
Oberteuffer v. Robertson, 116 *Id.*, 499.
Robertson v. Frank, 132 *Id.*, 17.

That "if the appraisal was unauthorized," the in-

voice (as corrected upon entry) "should have been the only guide," see WOODBURY, J., in

Rankin v. Hoyt, 4 Howd., 332.
Greeley v. Thompson, 10 *Id.*, 239.

The legal method for determining whether the invoice or entered value, or some larger amount, is to be the basis upon which the appropriate rate of duty is to be computed, is established by Chapter Six of Title XXXIV. of the Revised Statutes, Sections 2899 to 2953, entitled "Appraisal," as amended, or superseded, by the Customs Administrative Act of June 1, 1890.

Howland v. Maxwell, 3 Blatch., 146.
Carnes v. Same, *Id.*, 421.
Manhattan v. Same, 4 *Id.*, 408-9.

That method, then, is by strict compliance with these statutory directions as to appraisal.

The cases hereinbefore cited (and very many more might be cited of similar purport) show that if this prescribed method is not strictly followed, the appraisal is a nullity.

Ystalifera v. Redfield, 23 F. R. 650.

A result legally correct can only be reached through the proper application of correct legal principles.

Only those principles are legally correct, and to be observed, in this matter, which Congress has prescribed as the rule of action.

Inter alia, it has required the goods sent to the public store to be "examined" by the appraisers. If they fail to make such an examination as the law requires their action is a nullity, if properly protested against, etc.

Greeley v. Burgess, 18 How., 415-6.
Oelbermann v. Merritt, 123 U. S. 356.

In the Burgess case below, Judge CURTIS held that, if the appraisal was illegal, and the importer by his pro-

test, called the attention of the Collector under whose direction it was made to this illegality, and the collector ratified and adhered to the appraisement in assessing duty, an action to recover any excess of duty thereby illegally exacted could be maintained. without calling for a reappraisement.

In delivering his opinion upon this point, CURTIS, J., observed:

It is argued, that the importer is obliged to take an appeal, if dissatisfied for any cause, and that he is entitled to two regular proceedings, and to the fair judgment of both sets of appraisers thereon. I consider him entitled to have both proceedings regular, but *I do not think he is bound to take an appeal, if the government appraisers have not proceeded in conformity with the authority conferred on them by law.* In my judgment, he may and should, in such a case, make his protest, and point out the irregularity, or departure from the law, and stand upon it, as the ground of refusal to pay the increased duty, and in such a case, the Collector would not be justified in exacting the increased duty, by an illegal appraisement. But if he demands a reappraisement and that is regular, he waives all objection to the first, which is superseded and rendered unimportant by the second, on which the law, in terms, requires the Collector to proceed, as final and binding.

The objections to the proceedings of the government appraisers are, therefore, immaterial in this case. But I am of opinion, the proceedings of the merchant appraisers were not conformable to law, upon the facts offered to be proved by the plaintiffs.

Burgess v. Converse, 2 Curt., 220.
U. S. v. McDowell, 21 Fed. R. 564.
Oberteuffer v. Robertson, 116 U. S. 499.
Robertson v. Frank, 132 Id. 17.

The foregoing quotation is applicable to "case No. 14, 108 A," as to which no reappraisement was had. (Rec. 9.)

Upon the others a reappraisement was called for, but it was illegally conducted (as we say) and ineffective.

If the appraisal be illegal, we base our claim upon *that* illegality in the exaction. If the basis of duty be the result of an unlawfully conducted *re*-appraisement, then we make that the ground of our claim; that the action of the government is illegal in *this* respect. And upon the theory indicated in these sentences, there is included in the present petition items where there was no reappraisement, as well as others where there was one—or what purported to be one.

28 Cases, 2 Ben. 65.

Appraisals have been held illegal, and the invoice and entered value declared the proper basis of assessment, where the appraisers erred

(1.) As to *time*. Griswold v. Lawrence, 1 Blatch. 499.

(2.) As to *place*. Thompson v. Maxwell, 2 *Id.* 385.

(3.) As to *quantity*. Schuchardt v. Lawrence, 3 *Id.* 397.

(4.) As to *currency*. Lowenstein v. Maxwell, 2 *Id.* 404, and Alsop v. Same, 3 *Id.* 399.

(5.) As to *mode and character of the examination*, etc. Burgess v. Converse, 2 Curt. 216.
Greeley v. Burgess, 18 How. 413.
Oelbermann v. Merritt, 123 U. S. 356.

(6.) As to the *construction of the invoice*. Arthur v. Goddard, 96 *Id.* 147.

(7.) Or *in adopting any incorrect principle of law*.
Robertson v. Frank, 132 *Id.* 17.

The averments of our petition—that the appraising officers "did not act in accordance with their own

opinion," but *upon compulsion* and contrary to their own judgment," and "without regard to the evidence" sufficiently state grounds of illegality to entitle us to a review of the proceedings, to determine the truth of these allegations. If ascertained to be true, the enhanced duty and penalty are to be refunded, as illegally exacted.

The assertion "that the goods were not fairly and faithfully examined by the appraisers" was held sufficient, in a protest required by law to be specific, "without disclosing the grounds upon which he contended that the appraisement was unfair or unfaithful."

Greeley v. Burgess, 18 How. 417.

The protest asserted not merely an unfair appraisal but "fair valuation in the invoice."

Burgess v. Converse, 2 Curt. 217.

An "arbitrary" addition to the value—especially when the arbitrariness is that of an unauthorized person, exercising unlawful 'compulsion'—invalidates the proceedings.

Reiss v. Redfield, 4 Blatch. 382, § 3.
Gray v. Lawrence, 3 *Id.* 118, § 2.
Arthur v. Goddard, 96 U. S. 147.
Robertson v. Frank, 132 *Id.* 17.

It may be argued by the government that, although a judicial examination and determination of the question of the legality of an appraisement was permitted prior to June 10, 1890, this right was taken away by the thirteenth section of the act of that date. (26 Stats. 136–137.)

Even if it should be found to take away this right (which we cannot believe possible) it would by no means follow that the right to judicial scrutiny into the lawfulness of the *penal* exaction was not preserved. This is an independent question, involving other considerations.

The tariff system, as a whole, must be regarded in scrutinizing each alteration, so there may be no disturbance of existing legislative rules of general application, beyond the *clear* intention of Congress.

Saxonville v. Russell, 116 U. S. 21.
Wilson v. Maxwell, 2 Blatc. 319, 320.

This is not a rule of construction peculiar to revenue legislation. It applies to land laws, and every such *system* of statutory regulation.

Patterson v. Winn, 11 Wh. 386, top.
Alexr. v. Alexandria, 5 Cr. 7, 8.
Cæsar Griffin, Chase, 364.
Ryan v. Carter, 93 U. S. 84.

In its language, this act of 1890 is no more peremptory, as to the finality of an appraisement, than were corresponding provisions of prior statutes.

Rev. Stats., Sec. 2906 required the collector to cause the market-value of imports to be appraised; "and such appraised value shall be considered the value upon which duty shall be assessed."

Section 2929 authorizes the appraisers to revise the work of their assistants; and the collector to require a reappraisement.

Now; the next section (2930) giving the dissatisfied importer the privilege of calling for a reappraisement, concludes;—"and *the appraisement thus determined shall be final*, and be deemed to be the true value, *and the duties shall be levied thereon accordingly.*" (R. S., 2d ed., 567 top, § 2930.)

Nevertheless, the Courts have held, in several of the cases cited in the margin of that section, and in those hereinbefore mentioned *(ante*, pp. 7 to 10*)* that such an appraisement is *not* final if the appraisers were either guilty of fraud, or acted improperly or illegally, whether through an unauthorized construction of the law, or in excess of their authority, or in violation or disregard of the statutory rules governing their action;—in which

event the duties were *not* levied accordingly, but only upon the entered value. See cases, *ante* (p. 7) and *passim.*

Hilton v. Merritt, 110 U. S. 106 bot.
Oelbermann v. Same, 123 *Id.* 356.
Auffmordt v. Hedden, 137 *Id.* 335–6.
Hedden v. Iselin, 142 *Id.* 676.

The thirteenth section of the act of 1890 will, upon reading, be found the exact equivalent of the sections of the revision to which we have referred; and the clauses as to the finality of an appraisement almost in *totidem verbis.* (26 Stats. 137.)

The fourteenth section of the act corresponds to R. S., Sec. 2931. In identical language, each declares the decision of the collector, "as to the rate and *amount* of duties," to be final, unless protested against; the decision of the Board is the substitute for the appeal to the Secretary; the application to the Circuit Court is the equivalent of the suit against the collector; and the cases wherein such application is filed are excepted from those in which the collector is to liquidate the entry according to their recorded determination.

This section preserves the pre-existent right of protesting against and reviewing an *amount* of duty (or any fees, etc.) illegally exacted, as well as against an illegal *rate*; and only refers to the next section for the *mode* or manner of applying for such review.

A perusal of this section (14) shows that "the rate and *amount*" of duties properly chargeable on importations, and "all fees and exactions" thereon are equally the subject of protest, if the party paying is dissatisfied with the collector's decision. (26 Stats. 137.)

"Upon such notice" of dissatisfaction, the collector is to transmit *the invoice* (which is the only document specifically named) "and all the papers and exhibits *connected therewith* to the board of three general appraisers", etc., "which board shall examine and decide *the case thus submitted,* and their decision

. . . shall be final . . . EXCEPT in cases where an application shall be filed in the circuit court *within the time* and *in the manner* provided for in section 15 of this act." *(Ibid.)*

If this exception is not the equivalent of a declaration that in every case where a question of *illegality* arises, as to rate, amount, fees or exactions the board's decision shall *not* be final, it is a delusion and a snare.

We will show, presently, that such was the intention of Congress, as stated by the advocates of the bill therein.

The volumes of the federal reports, in addition to many of the decisions hereinbefore cited, afford abundant evidence that as gross injustice can be, and has often been, done to merchants by extortionate fees and exactions (as in the case of 'charges,' etc.) and through illegal estimation of the currency in which invoices are made out, as by erroneous classifications. (As to currency, see numerous cases in vols. 2, 3 and 4 of Blatchford's reports.)

Oberteuffer v. Robertson, 116 U. S. 499.
1 Blatc. 346; 3 *Id.* 145 and 368.
Robertson v. Frank, 132 U. S. 17.
Same v. Bradbury, *Ibid.* 491.
Rosenstein v. Magone, 34 F. R. 120.
Morris v. Cadwallader, 33 *Id.* 243.
Winter v. Same, 42 *Id.* 405.
Gordon v. Magone, 40 *Id.* 747.
Merritt v. Welsh, 104 U. S. 694.
Morrill v. Jones, 106 *Id.* 466.
Iselin v. Hedden, 28 F. R. 416.
Hedden v. Iselin, 24 Blatc. 455.

This last case is one of an illegal exaction of *fees*.

Let us suppose another instance, which is by no means all supposition; that—notwithstanding the act of June 10, 1890, § 22 (26 Stats. 140) abolishes "*all* fees" exacted by customs-officers upon the entry of goods "and the passing thereof through the customs", either for import or export, except those provided by that act

—the collector continues to exact the weighers' and gaugers' fees demandable only under R. S. secs. 3023 and 3024, and is sustained in so doing by the board of three appraisers, or a majority thereof :—can it be that so plain a violation of an express statute cannot be judicially remedied ?

The proviso to section 22 shows how strong may be the interest of the officer to extort every possible fee ; since the amount of them, in many cases, is made the measure of official compensation. It can hardly be that it was intended the mere assent of a couple of administrative officers should suffice to nullify the statute. Yet, the government so contends, seeking to confine all judicial review to classification and consequent rate merely ;—denying that there is any judicial restraint upon any other " exaction ", however grossly and manifestly illegal !

The act merely prescribes a different method of appraising actual value, upon the basis established by law. No appeal lies upon the ground that the result rested upon insufficient evidence, or was contrary to its weight, or that it was not admissible or competent under technical rules ; but an appeal is preserved as to appraisals disregarding statutory requirements, and as to all fees and exactions extorted in violation of law :— in short, where there had been an assumption of powers not conferred by statute, or the abdication of such powers at the dictation of officials having no right to control the appraisers.

Auffmordt v. Hedden, 137 U. S. 325.
Comp. *Hedden v. Iselin*, 142 *Id.* 676.
Munsell v. Maxwell, 3 Blatc. 364.
Lowenstein v. Same, 2 *Id.* 401.
Tucker v. Kane, Tan. 146.
Wills v. Russell, Holmes, 228.
U. S. v. Nash, 4 Cliff. 107, 112.

The *subjects* of appeal, from the collector to the board, and from the latter to the circuit court, are

stated in the fourteenth section: the *modus operandi* of the appeal to the circuit court is necessarily the same in the matter of an amount *illegally* ascertained, or of fees, charges and other exactions illegally extorted, as in that of classification for duties; and is prescribed as "the manner" of re-examination as to them, by reference, in section 14, superseding any necessity for the repetition of the words 'amount,' 'fees,' etc., etc., in the fifteenth section.

The Congressional purpose was simply to substitute this board of three governmental appraisers for one made up for each separate occasion by a merchant appraiser and one selected by the Collector, etc. The *function* of this new board was intended to be precisely that of the former; and the right of appeal therefrom was not intended to be abridged.

This becomes apparent by reference to the proceedings reported in Vol. XXI, Part IV, Congressional Record, 51st Congress, First Session, pp. 4004 *et seq.*

The chairman of the Senate Committee, Mr. Allison, said;—

"We have *substituted* these experts [which the merchant-appraiser, etc., had to be. 123 U. S. 356.] these gentlemen, who are supposed to know *with reference to the values* and the classifications of imported goods, *for the judgment of the Secretary of the Treasury who from necessity must deal through subordinates . . .* and *these appraisers are simply substituted for them.* When the case comes into the courts of the United States, then it proceeds according to the forms of the courts," etc. *(Ib.* p. 4006.*)*

He subsequently declared, that, in proposing this law, his committee and associates

"*do not change existing conditions, or the existing law at all. We leave these people* [importers] *where they have been for half-a-century,*" etc., etc. *(Ib.*, 4012.*)*

It changed the constitution of the appraising board, but not the *modum procedendi.*

"It proposed no new system, but sanctioned, regulated and confirmed a system already established, to which the people were attached. Cong. Globe, 1st Sess. 39th Cong. part IV, pp. 3225–3228."

Jennison v. Kirk, 98 U. S. 459 bottom.

The foregoing sentence is the conclusion of a summary of Senator Stewart's remarks, in advocacy of the passage of the bill then under consideration. It is followed, in the opinion, by this observation;—

"These statements of the author of the act, in advocating its adoption, cannot, of course, *control* its construction, where there is doubt as to its meaning; but they show the condition" etc. . . . "and thus *serve to indicate the probable intention* of Congress in the passage of the act." (98 U. S. 459, 460.)

The quotations we have made from the discussion on this administrative act of June 10, 1890, were not uttered in mere advocating the measure, but in explanation of the method of agreeing upon the bill to be passed, to have a certain effect.

Senator Sherman explained that the bill, as finally agreed upon and enacted,

"provides that both the fact and the law may be opened and new testimony taken, and the case brought before the circuit court of the United States upon new testimony." (Cong. Rec. 4021.)

Referring to these proceedings "to inform the Court of the exigencies" which required this legislation, and the reasons therefor, we find the whole object was *to secure uniformity* in appraising values, which was not attainable by creating a new board upon each protested importation;—emphatically *not* to confer upon this substituted board any greater power, or opportunity, to act in violation of law, or in the infliction of unauthorized fees, penalties, or other exactions, than their predecessors possessed.

Am. Net v. Worthington, 141 U. S. 474.
Church v. U. S. 143 *Id.* 463.

Irrespective of individual utterances, the substance of the proceedings in Congress *(ubi sup., ante,* pp. 16, 17; 141 U. S. 474 and 143 *Id.* 463*)* will be found to be this; that the House sent to the Senate the administrative bill, without any appeal from the appraisers' decisions; that Mr. Evarts and the other "lawyers of the Senate" proposed so to amend as to give a judicial hearing *before the Board;* and that the final mutual concession and agreement upon the bill, as it was enacted, was to give such a hearing, only *upon appeal,* as the same had been theretofore exercised "for half a century."

Without a glance at the Congressional Record, the legislation of the preceding half-century itself is a persuasive consideration of the congressional purpose in this act, studying it in its entirety.

As this Court thought it not useless, fifty years ago, to summarize, with supporting citations, this general doctrine, counsel may be pardoned now for re-producing a few sentences from that opinion:—

"The correct rule of interpretation is that, if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them," etc. . . . . "*If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute,*" etc. . . . . Wherever any words of a statute are doubtful or obscure, the intention of the legislature is to be resorted to, in order to find the meaning of the words." . . . A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. . . . . *These citations are but different illustrations of the rule that the meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded,* from the end in view, or the purpose which was designed." . . . .

"This Court has frequently acted upon the rule." . . . (4 Dall. 14.) "In 2 Cranch, 33: 'A law is

the best expositor of itself—that every part of an act is to be taken into view', etc. . . . "In U. S. v. Fisher *(Id.* 386*)* the Court said: . . . 'that every part is to be considered, and the intention of the legislature tobe extracted from the whole', &c. . . . In the construction of statutes, one part must be construed by another."

U. S. v. Freeman, 3 How. 564-5.
U. S. v. Babbit, 1 Bl. 61 near bot.
Atkins v. Disint. Co. 18 Wall. 301 bot.
Ross, 140 U. S. 475, middle.

In a much later case, this court thus again expressed the same idea:—

"No known rule of law requires us to interpret it according to its literal import, when its evident intent is different. It *may* be that the words taken in their usual sense would exclude the case of Dodier; but if it can be gathered *from a view of the whole law, and others in pari materia,* that they were not used in that sense, and if they admit of another meaning in perfect harmony with the general scope of the statute, it will be adopted as the declaration of the will of Congress. *Especially is this so when this construction withdraws the least number of cases from the operation of the statute.*"

Ryan v. Carter, 93 U. S. 84.

The next paragraph of the opinion, upon the same page, commences;—

"If there were any doubt remaining about the correctness of this construction, it would be removed by a consideration of the act of 1807, which is in *pari materia.*" *(Ibid.)*

Levy v. Coroner, 2 Wall. 508-9.
Stewart v. Kahn, 11 *Id.* 504.

In the cause at bar, the court below erred in confining its attention exclusively to the narrowest interpretation of sec. 15 regardless of the preceding section, as of preceding laws and of the history of this enactment—which is a *remedial* statute.

"In searching for a literal construction of an act, it would seem to be generally true, that positive and explicit provisions, comprehending in terms a whole class of cases, are not to be restrained by applying to those words an implication drawn from subsequent words, unless that implication be *very* clear, *necessary* and irresistible."

Faw v. Marstellar, 2 Cr. 23, 24.

Sec. 14 denies finality to the board's decision of any case, "thus submitted," involving "fees or exactions of whatever character," in which the protesting importer files his application in the Circuit Court "within the time and in the manner provided" in the following section. (26 Stats. 137.)

It cannot be that the court has no jurisdiction to hear and determine an application which the law authorizes to be made to it.

Valentine v. Piper, 23 Pick. 92.
Decker v. Freeman, 3 Me. 388.

The language of these cases is merely another form of stating the proposition that whatever is implied in a statute is as much a part of it as what is expressly declared.

As we have already noticed (ante, p. 14) not only the innumerable instances of absurd classifications brought before the courts, but the very numerous ones of the extortion of illegal fees and charges, contrary to the most explicit statutory prohibition (116 U. S. 499), and of the addition of unauthorized requirements, all indicate the need of judicial supervision, to prevent the grossest injustice being thus inflicted by administrative officers; and it is manifest that this evil is as greatly to be apprehended from the new triumvirate board as at the hands of those for whom it is substituted. Indeed, the danger is greater, from the fact that the present board is composed entirely of federal officials, while the former one had upon it a merchant.

If there be any judicial protection against the usurpation of elsewhere irresponsible power, in contravention of positive enactment, our petition certainly states a sufficient occasion and demand for it.

IV.

Penal duty.

Conformably to the seventh section of the administrative act, the appraiser's decision affixed, as the penalty of undervaluation, "a sum equal to two per centum of the appraised value for each one per centum that such appraised value exceeds the value declared in the entry." (26 Stats. 134–5.) This action the board affirmed. (Rec. 9, fol. 17.) Against this exaction the importers protested. *(Id.* 7, fol. 13.*)*

This was a penal addition to that *rate* of duty which the law prescribed upon the entry of the goods.

It is called "additional duties" *(Ib.)* but it is in fact a penalty; and would be were it called a 'donation' or 'voluntary contribution.'

U. S. v. Choteau, 102 U. S. 611.

Courts will regard substance rather than any veneering phraseology; stripping off such disguises, and dealing with things as they are; not allowing a citizen to be deprived of his property without redress, by a mere euphemism.

Ry. v. Winans, 17 How. 40.

"To hold otherwise would be to sacrifice a great principle to the mere form of procedure." (102 U. S. 611.) This provision is intended to prevent under valuations, treated in many other statutes as a crime;

and the means of prevention is by this punishment of its occurrence.

Chief-Justice TANEY noticed that this "*penal* exaction" of 20% was inflicted "by way of *punishment* for the attempt upon the revenue-laws of the country,". adding;

"Here are two *distinct* things; One is an ascertainment of actual value, the other the *penal* consequence flowing from this ascertainment of real value; the first fixes the actual value", etc. . . . "But *the second is quite another affair*, etc. (Tan. 186)

Hence, although the act of 1799 (R. S. sec. 3015) allowed a drawback of duties upon all importations exported; and the act of 1800 (R. S. § 3027) excludes therefrom only *such* "additional duties" as are levied upon goods brought in foreign bottoms; the Chief-Justice concluded there could be no refund of this 20% upon exportation, because it was a punishment inflicted upon the importer by levy upon "the articles in regard to which he had *offended*."

Bartlett vs. Kane, Taney, 186.
Affirmed, 16 How. 263–274.

Upon this last page, it is said the drawback law "does not include in its purview any return of the forfeitures or amercements resulting from illegal or fraudulent dealings," etc. (16 How. 274.)

It is exacted, then, *as a punishment for fraud and violation of law.*

"A provision, as in this case, that a party shall forfeit a partieular sum, in case he does not perform an act required by law, has always in the construction of statutes, been regarded not as a contract with the delinquent party, but as a *punishment for an offense.* In legislative proceedings a forfeiture, is always to be regarded as a punishment inflicted for a violation of some duty imposed upon the party by law."

Md. v. B. & O. 3 How. 552.

"The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted", etc.

U. S. v. Choteau, 102 U. S. 611.
The Strathairly, 124 *Id.*, 571.

A statute which describes an act or omission as punishable and imposes a fine, penalty or forfeiture—consequent deprivation of property, in any form—creates an offense.

Moore v. Ills., 14 How. 19, 20.
Coleman v. Tenn. 97 U. S. 537.
2 Tom. L. D. 664; 4 Jac. L. D. 432.

Manifestly, this 20% *added to* the "duty" upon the goods is penal in its character, object and effect, by whatever term or euphemism Congress may see fit to designate it.

Duty on the appraised value is all the United States would collect of similar goods, not invoiced ten per cent. below that value. That satisfies the government's expectation of revenue. To deter from fraud or undervaluation, and to punish it (if committed) is the sole object of the 20% additional. R. S., Sec. 2948, declares it shall *not* be deemed a penalty for the purpose of distribution (as it had been before, 16 How. 274); implying that such *is* recognized to be its general character; and that it is to be so deemed, for every *other* purpose.

Ring v. Maxwell, 17 Howd. 148.

"*As between the United States and the importer*, and in reference to the subject of drawbacks and debenture, *it must still be regarded in the light of a* PENAL *duty.*" Bartlett v. Kane, 16 How. *274.

Stairs v. Peaslee, 18 *Id.* 527–529.
2 Blatch. 385; 3 *Id.* 129.

"Additional duty by way of *penalty.*" Kriesler v. Morton, 2 Curt. 240, citing 17 How. 148.

Hence, if added, goods cannot be forfeited under R. S., Sec. 2839.

U. S. v. 67 Pckgs. 17 Howd. 94 top.
U. S. v. Sugar, 1 Ab. U. S. 421.

Accordingly, the existing Customs Regulations of 1890, declare;—

"Art. 896. It is optional with the Government whether to sue for forfeiture, or to impose the additional duty; but it cannot do both. If proceedings *in personam* for recovery of home market value have been instituted, additional duties cannot be imposed for undervaluation."

This *must* be because a person is not to be twice *punished* for the same *offense*.

Decisions innumerable might be cited in which the U. S. Supreme and Circuit Courts have called this addition a "penalty." *Ex. gr.*, NELSON, J.; 4 Blatc. 224; and cases *passim*. So does the U. S. Attorney General. (15 Atty. Gen. Op. 335.)

It was long uniformly recognized as such in numerous instructions and customs decisions of the Treasury Department, prior to June, 1889.

21 Int. R. Rec. 91; S. S. Nos. 3335, 3370, 3483, 7226, 8089 and innumerable others.

As R. S. § 2948 and this court held it not distributable as penalties are, among officers and informers (17 How. 148, *sup.*), the Secretary held it not within the statute authorizing remission. (S. S. 7308.) Yet it was held to be "*by way of penalty;*" and only not so distributable because of the express terms of the statute (17 How. 151) former statutes having made it so.

June 12, 1889, the then Asst. Secy. (now presiding in the Board of Appraisers) instructed the Chicago collector—promulgating it for the general information of customs officers—to discontinue the use of 'penal'

and 'penalty' with reference to these 'additional duties,' as "confusing and misleading." S. S. 9427. Nevertheless, the *thing* is just what it was before. The change of *name* is like the continued exaction of gauger's fees, sanctioned by calling them "charges" in the custom house.

It comes within all recognized definitions of 'penalty'; which did not primarily include corporeal punishment, but *only* "*money* recoverable by way of punishment." (4 Bla. Com. 5); and it is with a view to this definition that the commentator defines penal statutes to be acts of Parliament whereby a *forfeiture* is inflicted for transgressing the provisions therein enacted.

Regardless of form, "it is in the *nature* of a punishment for non-performance of an act, or the performance of an unlawful act."

San Luis v. Hendricks, 71 Cal. 245.

"If a larger sum is to be paid upon a default, it is a penalty."

Protector v. Grice, 5 Q. B. Div. 596.

Burrill and Bouvier define it as a "*pecuniary* punishment or sum of money imposed by statute to be paid as a punishment for the commission of a certain offense."

Bank v. Bliss, 13 Ab. Pr. 236.

As this statute inflicts a penalty for the crime of a stated amount of undervaluation; deprives the offender of a specified portion of the affected property as punishment of an offense the commission of which, in the present instance (and usually), the accused party denies;—there must either be an opportunity afforded for judicial determination of the issue made by this accusation and denial, or else the law denouncing the penalty is unconstitutional, as contravening the "Fifth" amendment of the Constitution, which forbids

that any man "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

There is no other alternative.

In several cases (Oelbermann v. Merritt; the Frank case; and others) it has been strenuously contended by counsel, that Sect. 2930 of the Revision is unconstitutional; but the Courts decided in favor of the parties making this contention upon other grounds, and waived consideration of this subject.

The Auffmordt case (137 U. S. 324–5 and cases there cited) simply held that the appraisers could be made final judges of *value, provided* their action was not fraudulent and conformed to law. It has *never* been held that a penalty could be irrevocably inflicted by administrative officers.

In the Oelbermann case, it was argued that R. S. Secs. 2900 and 2908, imposing the 20% penalty, were also unconstitutional; but that question was not passed upon, then nor in subsequent cases.

The penal, or 20%, provision of Secs. 2900, 2908, now found in the act of June 10, 1890 (26 Stats. 134–5, § 7) are thought to conflict with Article I., clause 8 of the Constitution (requiring duties to be laid uniformly) and with the Fifth and Fourteenth amendments, securing to the citizen the protection of "due process of law."

Davidson v. N. O., 96 U. S., 97.
McMillan v. Anderson, 95 *Id.*, 37.
Hilton v. Merritt, 110 *Id.*, 97.
Hagar v. Rec. Dist., 111 *Id.*, 701.

Conceding that the government 'has the right to prescribe the conditions on which it will subject itself to the judgment of the courts *in the collection of its revenues,*' the legislative department cannot confide to administrative officers the *infliction of penalties* without the interposition, or final sanction, of judicial authority.

Congress cannot constitutionally prescribe, in an act imposing conditions of importation, that goods which the collector or appraiser deems to have been smuggled shall by the mere fiat of that officer, be confiscated upon that ground;—nor can it say that any percentage of them (or of their value) shall be forfeited for non-compliance with customs laws, upon an executive officer's say-so.

Dunn v. Burleigh, 62 Me. 37.
King v. Hayes, 80 *Id.* 206–7.

The right to impose conditions of importation is no greater than that to regulate inter-State commerce; or to control the distillation of spirits by internal-revenue laws. Certainly, no distillery, nor any percentage of its value, or of the distiller's bond, could be forfeited upon an assessor's or inspector's ascertainment of a non-compliance with those laws.

This right of regulation is no greater than that of a State to declare and suppress nuisances, or to control the use, transfer and descent of property; but a building dedicated to gaming, the illegal sale of liquor, etc., cannot be confiscated upon the mere conclusion of a police functionary, even though an express statute should make it so confiscable. (62 Me. 37.)

Lowry v. Rainwater, 70 Mo. 152.
Fisher v. McGirr, 1 Gray, 1.

It will suffice, if a judicial hearing can be obtained by appeal; but it must be *somehow* obtainable. (25 Conn. 285.)

A Connecticut statute makes it an offense to keep an unlicensed place where it is '*reputed*' that intoxicating liquors are sold; but the reputation must be judicially ascribed. (State v. Buckley, 40 Conn. 246.)

Upon large and costly merchandise, this added penalty must frequently exceed the value of liquors, etc., usually condemned under State laws; and it is de-

nounced upon the appraisers' opinion of so uncertain and fluctuating a thing as the market-value of goods, at a given date, in the principal markets of a distant country.

In the cause at bar, it was inflicted in a manner so unjust as always and necessarily to have been held illegal by the courts ; as our petition states (Rec. 13, pars. 5 and 6) not upon the exercise of an unbiased judgment, but "*upon compulsion* and *against their own judgment*" and in obedience to the orders of one "*who never himself saw, examined or appraised said goods.*" (124 U. S. 356; 132 *Id.* 17.)

The foregoing suggestions are made as tending to emphasize the necessity (in order to hold the law constitutional) of such construction of the act of June 10, 1890, §§ 14 and 15, as permits such an application as that of the petitioners to be made to the circuit court: otherwise, there is a confiscation of property "without due process of law;"—which has never before been attempted under any customs legislation.

Confessing "that the constitutional meaning or *value* of the phrase 'due process of law' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights" (96 U. S. 101 bottom) this Court deems it the part of wisdom to ascertain "the intent and *application* of such an important phrase in the federal constitution by the gradual process of inclusion and exclusion, *as the cases presented for decision shall require*, with the reasoning on which such decisions may be founded." *(Id.* 104.)

This method of eliminating a definition applicable to any given case necessarily requires an examination of earlier decisions, to ascertain where the line of inclusion and exclusion will fall, with reference to the matter *in fieri.*

Heretofore, certainly, it has never been so drawn as to subject citizens to a penalty, without any opportunity to be heard (by appeal or otherwise); inflicted by administrative officers, acting under compulsion, and without regard to evidence!

"The nature and theory of our institutions," etc., constrain us "to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." (118 U. S. 369; 129 *Id.* 124.)

If this statute of June 10, 1890, § 15, be susceptible of no other construction than that an appeal is denied us, it is unconstitutional; as our petition shows we have been subjected to "the play and action of purely personal and arbitrary power."

It is to prevent the exercise of such power, *in behalf of the government*, that the provision for due process was incorporated into the Constitution by amendment.

"As to the words from Magna Charta, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this; that they were intended to secure the individual from the *arbitrary exercise of the powers of government*, unrestrained by the established principles of private rights and distributive justice."

Bk. v. Okely, 4 Wh. 244.
Sabariego v. Maverick, 124 U. S. 292–3.
Kans. Pac. v. Russell, 8 Kans. 558.
Brown v. Denver, 7 Col. 305.
San Mateo v. So. Pac., 13 F. R. 322.
Santa Clara v. Same, 18 *Id.* 385.

The history of the times shows that the legislative power is constantly striving to overpass the bounds deliberately set to their authority; and that the people are compelled to place new barriers against evil legislation, and to call frequently upon the courts to see they are not scaled or overthrown. Commenting upon the report of "the Queue case," (5 Sawy. 562) in 18 Am. Law. Reg., 676, Judge Cooley says:

"It is a matter of every-day observation that *legislatures are accustomed to treat constitutional limitations as imposing no moral obligation* whatever upon their members;" and there is therefore a constant effort to evade, rather than to observe, them.

18 Am. Law Reg., 684.

In the preface to the second edition of "Constitutional Limitations," Judge COOLEY employs similar language. After remarking that his book was originally "written in full sympathy with all those restraints which the caution of the fathers had imposed upon the exercise of the powers of Government" . . . . and "endeavored to point out that there are on all sides definite limitations which circumscribe the legislative authority, *independent of the specific restrictions which the people impose by their State constitutions*," he adds;

"Further reflection has only tended to confirm him in his previous views of the need of constitutional restraints at every point where agents are to exercise the delegated authority of the people; *and he is gratified to observe that in the judicial tribunals the tendency is not in the direction of a disregard of these restraints.*"

Another distinguished jurist writes: —

"It is worth while to remark, that in every new and amended State Constitution, the Bill of Rights spreads over a larger space; new as well as more stringent restrictions are placed upon legislation. There is no danger of this being carried too far: as Ch. KENT appears to have apprehended that it might be. There is not much danger of erring upon the side of too little law. The world is *notoriously* too much governed. Legislators almost invariably aim at accomplishing too much. Representative democracies, so far from being exempt from this vice, are, from their nature, peculiarly liable to it."

Sharswood, Prof. Ethics, XXII. and XXIII.

In this preface to that work, he notes that the citizen is especially to be protected in his property from the

legislative aggressions "of the Government itself." (*Id.* XXI. and XXXIV.)

Mo. v. Humes, 115 U. S. 519 bot.

Because of "the aggressive tendency of power." Cooley, Const. Lim. [*351.]

In Pres. Woolsey's edition (1875) of Lieber's 'Civil Liberty and Self-Government,' an editor's note to page 161 observes;—

"Specific checks on legislative power are coming more and more into use. The people are beginning to distrust the legislatures, as they formerly did the executives."

To a reasonable extent, they should distrust *both*. 'The price of liberty is eternal vigilance.' *(103 U. S., 191-2.)*

The strongest check is the requirement of due process, before one shall be corporeally and pecuniarily punished.

"The phrase 'due process of law' implies, as I have already shown, not only that the proceeding shall be such in form and substance as the established principles of the common law require, but that *the tribunal before which it takes place shall be judicial*," etc.

2 Hare's Am. Const. Law, 849, citing 103 U. S., 168.
Kennard v. La. 92 *Id.* 481.
Wynehamer v. Peo. 13 N. Y. 395.

"The judicial power follows next after the legislative power; for it cannot act until the laws are prescribed. Every wise legislator annexes a sanction to his laws, which is most commonly *penal*, (that is) a *punishment* either corporal or *pecuniary*, to be inflicted on the member who shall infringe them. It is *part of the judicial power* (which in this territory has always been, and always ought to be, *a court and jury) to ascertain the member who hath broken the law.*" Essex Result,
Life of Parsons, Ch. J., p. 372.

Of the proposed Federal Constitution James Sullivan wrote delegate Rufus King ;—

"I am more than pleased, *having only one doubt*, which is, *whether the objects of the judicial power are well defined.* I wish you to attend to this ; for *I consider it the main-spring of the whole machinery.*"

1 Life of Sullivan, 220.

It was attended to by the Amendments.

As adding such strength to our position as to make it impregnable, special emphasis is laid upon the unconstitutionality of the infliction of a *penalty* upon a person, unheard ; but it is believed to be also unconstitutional to deny opportunity to judicially test the *legality* of an exaction.

This differs from any dispute as to its *amount.* It rests on the proposition that property has been taken *contrary* to law.

The opinion of the appraisers as to *value* cannot be disturbed, provided it is legally ascribed.

No interference with the *collection* of a tax, or even of a penalty, is necessary ; but at *some* stage of the proceedings, whether before or after payment, opportunity should be afforded to contest their legality. *A fortiori*, it *must* be so, as to a *penalty.*

The course of tax legislation, federal and state, throughout the Union, has generally recognized the propriety, if not the necessity, of affording the taxpayer such opportunity ; and the exceptions to the rule have been promptly corrected, or declared unconstitutional.

The uniformity of this rule is also a ground for doubting any Congressional intention to depart from it in the present instance, and for construing sections 14 and 15 of this statute accordingly.

The course prescribed by the customs laws is closely analogous to, if not identical with, that pursued with reference to State taxation. The verified invoice corresponds to the bringing in and verification of lists by

a tax-payer ; as to which an appeal lies to a higher tribunal, where the protestant can be heard, if his list so presented is disregarded.

Hence, State decisions and text-books can be properly cited as to the true construction of the sections under consideration ; the tenor of which citations will be found in conformity with the utterances of this Court.

We shall find it strongly laid down by text-writers and in the State and Federal Courts, that these laws contemplate a regular hearing upon such an appeal; and numerous decisions that a statute undertaking to deny *such* a hearing would be unconstitutional.

As just noted, even if not a violation of the Federal Constitution, to deny the tax-payers a judicial hearing, this course of State and Federal Legislation and construction is a persuasive argument in favor of construing these sections of the customs laws as requiring a hearing of the importer upon his application to the U. S. Circuit Court, on appeal.

In 115 U. S., at page 334, this language of BYLES, J., is quoted :—

" that *although there are no positive words in the statute requiring that a party shall be heard, yet the justice of the common law will supply the omission of the legislature.*" (115 U. S., 334.)

Cooper v. Wandsworth, 14 C. B. N. S. 194.

Especially with reference to the *penalty* is it true that

" Due process of law implies the right of the person affected thereby *to be present* before the tribunal which pronounces judgment upon the question of life, liberty, or property, *in its most comprehensive sense ; to be heard* by testimony or otherwise, and to have the right of the controverting, *by proof*, every material fact which bears upon the question of right in the matter involved."

Zeigler v. R. R., 58 Ala., 599.
Thomas v. Gain, 35 Mich., 164.

Phila. v. Miller, 49 Pa., 440–8.
Nixon v. Ruple, 30 N. J. L., 60.
Patten v. Green, 13 Cal., 325.
Darling v. Gunn, 50 Ills., 424, 428.
So Platte v. Commrs., 7 Neb., 258.

COOLEY, C. J.,

"It seems proper to declare in this case that parties whose property is to be taken under summary tax-proceedings are entitled, as of right, to be heard at some stage in the proceedings before the tax shall become an established charge against them or their property."

Thomas v. Gain, 35 Mich., 164, citing
Butler v. Superv., 26 *Id.*, 22, and
Phila. v. Miller, 49 Pa., St. 448;—

also a number of English cases holding the assessing officer personally liable; then the Opinion proceeds:

"In this country, we do not allow *the justice* of the assessment to be inquired into in a suit to charge the officers with a personal liability; but it follows legitimately from this that parties taxed must have an opportunity to be heard regularly at *some* stage of the proceedings. Their rights are not to be concluded by proceedings which are wholly *ex parte*." (35 Mich. 165.)

Dool v. Cassopolis, 42 *Id.*, 548.

"In the words of a great judge, 'Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.'"

Boyd v. v. U. S. 116 U. S. 637 bot.

AGNEW, J.: "Land [imports] is taxed not as inanimate matter, which is insensate, and cannot respond to a duty, but as *property* to whose owner the law allows both time and place to respond", etc.

Phila. v. Miller, 49 Pa. St. 448.

"The commissioners of appeal act judicially, They try, determine and adjudge. . . . The proceeding, therefore, on appeal, before the commissioners of appeal, is in the nature of a suit wherein the party appealing is plaintiff and the assessor is defendant."

Nixon v. Ruple, 30 N. J. L. 60.

"However full and complete might be the jurisdiction of the board over the subject-matter, yet the party interested has, *according to the plainest principles of justice*, a clear right to a hearing and a day in Court; and any other view stands opposed to reason, justice, and sound policy, and to all those general principles which, in *all* cases, allow a party to be heard before his right of property can be affected by *any* tribunal.

Sioux v. Washington, 3 Neb. 43.
So. Platte v. Buffalo, 7 *Id.* 258.

Where a tax-payer hands in his list and the assessors accept it, without objection, the tax cannot be increased without notice and hearing.

Moors v. St. Com. 134 Mass. 431.
McConbey v. Smith, 73 Ills. 314.
Cleghorn v. Postlethwaite, 43 *Id.* 428.

"Due process of law requires that a party shall be properly brought into court, and that he shall have an opportunity (when there) to prove any fact which, according to the constitution *and the usages of the common law*, would be a protection to him or the property."

Peo. v. Superv., 70 N. Y. 234.

Proceeding by an *ex parte* examination (or, here, a decision *without* examination) if final, with no right to have any application to the Circuit Court heard, although the matter was determined below without hearing; and to inflict a penalty upon the unheard party, is not due process of law under the foregoing and other accepted definitions and all the decisions. "A hearing, or an opportunity to be heard, is absolutely essential."

Stuart v. Palmer, 74 N. Y., 191–5.
Howes v. Bassett, 56 Vt., 141, 143 top.
Hagar v. Rec. Dist. 111 U. S. 701 mid. 710–2.
Ky. Ry. Tax, 115 *Id.*, 335–6.
Taylor v. Porter, 4 Hill, 147, cited in
Burch v. Newburg, 10 N. Y. 397.

Rockwell v. Nearing, 35 *Id.* 305-7.
Campbell v. Evans, 45 *Id.* 358-9.
McMillan v. Anderson, 95 U. S., 37.
Remsen v. Wheeler, 105 N. Y. 579.

If the statute inflicts a penalty without a hearing, it treats the importer worse than this court permitted 'an alien enemy' to be treated; —

"If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

McVeigh v. U. S. 11 Wall. 267, citing
Calder v. Bull, and other cases.

Of the text-writers, we will only quote from that one who speaks with the greatest authority. Judge COOLEY says:

"*Construction of revenue laws.* In the construction of the revenue laws, special consideration is of course to be had of the purpose for which they are enacted. That purpose is to supply the government with a revenue. But in the proceedings to attain this it is also intended that no unnecessary injury shall be inflicted upon the individual taxed. While this is secondary to the main object—the impelling occasion of the law—it is none the less a sacred duty. Care is taken in constitutions to insert provisions to secure the citizen against injustice in taxation, and *all legislative action is entitled to the presumption that this has been intended.* We are therefore at liberty to suppose that the two main objects had in view in framing the provisions of any tax law were, *first*, the providing a public revenue, and *second*, the securing of individuals against extortion and plunder under cover of the proceedings to collect the revenue."

Cooley on Taxation (2d. ed) 265.

In a subsequent part of this work the author devotes several pages (pp. 361 to 366) to the question of the right of the tax-payer or assessed person to a hearing,

referring to the laws and decisions of the States upon this subject, viz. the bringing in of "lists" by the citizen, their effect, the opportunity for appeal, etc.; etc.; referring to the probability of the original assessment being unjust, as based upon imperfect if not biased information, &c.

"It is therefore a matter of the utmost importance to the person assessed that he should have some opportunity to be heard and to present his version of the facts before any demand is conclusively established against him; and it is only common justice that the law should make reasonable provision to secure him as far as may be practicable against the oppression of unequal taxation, by making the privilege of being heard a legal right. The obligation to secure such a right is recognized by the statutes of the several states", etc. . . . "In other states an appeal is allowed to some board of review; and perhaps there is no state which does not provide some method whereby it is intended that the party assessed shall have have a hearing before the assessment becomes fixed and final". *(Ib.* 361-2.*)*

He observes that when these statutory methods are followed, justice is likely to be preserved: "It is unfortunately often the case, however, that statutory provisions are not strictly observed, and that either the public or individuals will suffer in consequence". *(Ib)* He adds, that, in such instances,

"In substance, the question will be whether the right to be heard is *a constitutional right* and indefeasible.

Upon this subject *there is a general concurrence of authorities in the affirmative.* It is a fundamental rule that in judicial or *quasi* judicial proceedings affecting the rights of the citizen he shall have notice and be given an opportunity to be heard before any judgment, decree, order or demand shall be given and established against him. Tax-proceedings are not in the strict sense judicial, but they are *quasi* judicial, and as they have the effect of a judgment, the reasons which re-

quire notice of judicial proceedings are always present when the conclusive steps are to be taken." (*Ib.* 362–3)

He adds that it cannot lightly be assumed that the constitution "sanctions legislation under which officers might secretly assess the citizen for any amount in their discretion," etc.: (*Ib.* 364.) Still more, affix a penalty, without examination, hearing, or volition, but under the compulsion of usurped authority!

In the leading case before cited (Davidson v. N. O., 96 U. S. 97) *and in every other* where the question of due process has been raised in connection with taxation, this court has based the legality of the exaction upon the opportunity given to be heard thereon, primarily or upon appeal. (96 U. S. 97, § 4.)

In the paragraph commencing at the bottom of page 104

MILLER, J. observed;—

"That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden, is imposed upon property for the public use, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

Davidson v. New Orleans, 96 U. S. 104–5.

In the later case of Hagar v. Reclamation District (111 U. S. 708–9) it was noticed that the necessity for a notice and hearing "may depend upon the character of the tax, *and the manner in which its amount is determinable.*"

Upon the succeeding pages FIELD, J. observes;—

"But where a tax is levied on property *not* specifically, but according to its *value*, to be ascertained by assessors appointed, upon such evidence as they may

obtain, a different principle comes in. The officers, in estimating it act judicially", etc. . . . (Citing Davidson v. N. O., 96 U. S. 97)

Hagar v. Rec. Dist. 111 U. S. 710–711.

After quotation of the preceding paragraph from 96 U. S. 104 the statute was held valid because there was an opportunity to be heard in court (111 U. S. 711) and this former decision covered such a case.

Pursuing the process of inclusion and exclusion (110 U. S. 534 top) this court again notices this element; and, upon the next page observes, per MATTHEWS, J.;—

" It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be . . . . in the language of Mr. Webster . . . 'the general law, a law which *hears before it condemns*," etc.

Hurtado v. Cal. 110 U. S. 555.
Head v. Amoskeag, 113 *Id.* 26 bot.
Wurts v. Hoagland, 114 *Id.* 614 bot.
Walston v. Nevin, 128 *Id.* 582.
Hoke v. Henderson, 4 Dev. 15.
13 N. Y. 393–5; 419–421; 434; 437; 468.

At the Oct. Term, 1890, the paragraph from 96 U. S. 104 is followed by that from 111 U. S. 708–9; that the nature of the process may depend upon the character of the exaction.

Lent v. Tillson, 140 *Id.* 327.

No characteristic can be more determinative of the right to be heard than the *penal* nature of the exaction.

Judge SHARSWOOD notes that there is no legal difference between wresting so many dollars from a man and chaining him to compulsory labor during a period that will produce that sum (Prof. Eth. xxxv.)

Property is protected equally with the person; hence, a trespasser's property can be no more confiscated without judicial condemnation; or a sick horse killed

be paid for at a health-officer's arbitrary valuation; than the owner can be imprisoned in like manner.

"And while it may not be safe to undertake to determine in advance what, in every case, will be deemed due process of law, we feel no hesitation in saying that in a case like this, where the State undertakes to confiscate a person's property upon the ground that it has been used in committing a trespass upon the public lands, something more is necessary than an *ex parte* determination and command of the land agent. It will be noticed that the same protection is secured to property as to life and liberty. Will any one contend that it is competent for the legislature to pass an act authorizing the land agent to seize the person of a trespasser upon the public lands, and hang him, or imprison him for life, without any other trial of his guilt than the *ex parte* determination of the land agent himself, and no other authority than his own personal command? Of course not. No more is it competent for the legislature to pass an act authorizing the land agent to deprive a person of his property in such a summary mode; for what is due process of law in the one case must be equally so in the other. In the Constitution, life, liberty and property are all grouped together in one sentence, and the same protection which is secured to one is secured to all."

Dunn v. Burleigh, 62 Me. 36, 37.
King v. Hayes, 80 *Id.* 206-7.
Fisher v. McGirr, 1 Gray, 1.
Lowry v. Rainwater, 70 Mo. 152.
Rockwell v. Nearing, 35 N. Y. 305-6, quoting Taylor v. Porter, 4 Hill, 146-7, and other cases.
Cooley, Const. Lims. [*362].

"The right of private property has, in England, been almost as sedulously cherished and zealously guarded as that of liberty and life. The great commotions of that country have been, perhaps, as often brought about by illegal exactions and tortious seizures of money, or property, as by the gravest governmental aggressions against life and liberty."

Clark v. Mitchell, 64 Mo., 572, bottom,

where the court proceeded to give a few extracts to show how strongly cherished is the right of private property in that country, viz.:—

"It is indeed an essential principle of the law of England that the subject hath an undoubted property in his goods and possessions: otherwise, there shall remain no more industry, no more justice, no more valor. For who will labor? Who will hazard his person in the day of battle for that which is not his own?

Broom Cons. L., 228; and 234.

If Congress intended to confer upon administrative officers the power to inflict a penalty, without a day in Court, it confounded the distinction necessary to be observed between the different departments of the Government.

"No general principle of politics laid such hold on the constitution-makers and statesmen of America as the dogma that the separation of the three functions is essential to freedom. . . . It had already been made the groundwork of several State constitutions. It is always reappearing in their writings; it was never absent from their thoughts. . . . .

"Every one who undertakes to describe the American system of government is obliged to follow the American division of it into three departments,—executive, legislative, and judicial."

1 Bryce, 26, 27, 35.
De Tocqueville, Dem. in Am.
1 Hare, Am. Const. Law, 9.
Kilbourn v. Thompson, 103 U. S. 191.

In his article upon Harrington, to whom he attributes the propounding of this idea of separation of powers to the English people, Prof. Dwight observes:—

"Here he supplied the very life-blood of an American commonwealth; for if we omit these ideas from one of our constitutions, we might as well omit the constitution itself."

2 Polit. Sci. Q. 19 (March, 1887.)
Rutherford, Inst. Bk. II, c. IV, § VII.

To extort a *penalty* from a man, unheard, arbitrarily, is not only a violation of the constitution but of *natural right*, existing anteriorly to it, and independently of it.

Speaking of these rights, COOLEY, J., says; "There are some things too plain to be written," even in a constitution. 24 Mich., 107, cited *supra*.

"Written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former." 2 Webster's Works, 392. 1 Bla. Com., 124. 2 Story's Life, 278, letter to Dr. Lieber.

Calder v. Bull, 3 Dallas, 388, top; Wilkinson v. Leland, 2 Peters, 657.

In Bartmeyer vs. Iowa, 18 Wall., 132, middle, MILLER, J., mentions, as existing outside of constitutions, those "general principles, supposed to limit *all* legislative power." See, too, Merrill v. Sherburne, 1 N. H., 213, near top, per WOODBURY, J.

People v. Supervisors, 4 Barb., 74–5;
Benson v. Mayor, 10 Barb., 244–5;
Powers v. Bergen, 6 N. Y., 366–7;
Goshen v. Stonington, 4 Conn., 225;
Peo. v. Hurlbut, 24 Mich. 107;
Lee v. State, 26 Ark. 265.

V.

Remedy.

If this statute be so construed as to constitute an intrusion upon the rightful power of the judiciary, it is only *here* that the invasion can be repelled.

Unless this court come to our relief we are exposed defenceless to the assaults of unrestrained and arbitrary power.

Goldwin Smith incidentally notices that we have in-

stituted "a written constitution, *in the keeping of a Supreme Court*, by which all powers and jurisdictions are strictly defined and limited." 47 Contemp. Rev. 317.

"It is certainly something in which a citizen of the United States may feel a generous pride, that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, *come from what quarter it may*, is 'caught upon the broad shield of our blessed Constitution and our *equal* laws.'"

Ho v. Nunan, 5 Sawy. 563.

Mr. Evarts said;—

"It is as the guardian of *the Bill of Rights* in the constitution, as the watchful protector of the liberties of the people *against the encroachments of law and government*, that the people look to the Supreme Court with the greatest attention and the greatest affection."

Impeachm't Tr. 272 top.
Hurtado v. Cal. 110 U. S. 536 mid.

The record before this Court, certified by the Court below, serves the purposes of a *certiorari* and of a writ of error, and "the questions arising upon that record must be determined according to fixed rules of law."

Harris v. Barber, 129 U. S. 369.

EDWIN B. SMITH
Of counsel.

FILED
FEB 18 1893
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, 1892.

[illegible] & Co., Appellants,
vs.
The United States.
No. 1114.

[illegible] the Circuit Court of the United States for the Southern District of New York.

Certified on question of jurisdiction.

Statement to be submitted if appellants wish same to be printed.

Brief for the United States.

[illegible]
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

PASSAVANT & CO., APPELLANTS,
vs.
THE UNITED STATES.
No. 1118.

FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

CERTIFIED ON QUESTION OF JURISDICTION.

ADVANCED TO BE SUBMITTED IN ACCORDANCE WITH RULES 32 AND 6.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT AND THE RECORD.

This case comes up on a question of jurisdiction certified under section 5 of the act of March 3, 1891 (26 Stat. 826).

The record placed before the court is scant.

It may be inferred from the matter set forth that in November, 1890, the plaintiffs, Passavant & Co., imported "gloves" by the steamship *La Champagne*; that in July, 1891, they also imported, by the same vessel, "leather gloves." This is about all that is told of the dutied merchandise.

No bill of particulars is discovered, and no statement appears of the invoice value of either importation, or of any rate fixed on appraisal, or of any increase made upon invoice valuation, or of the aggregate exacted.

About all that can be found in the record as to the goods imported, or the increase of the invoice valuation on account of the appraisal, is set forth in the brief of plaintiffs' counsel, which says (p. 1) that plaintiff "imported into New York some gloves, which the collector caused to be appraised, and levied additional and penal duties thereon." Perhaps this paucity comes from the nature of the review.

It may be noted that the petitioners in the first three alleged errors of fact (p. 2), and in the corresponding alleged errors of law (p. 3), claim that the tariff act of 1890 was unconstitutional and void, by reason of grounds which have since the date of said petition been determined contrary to the claims of the petitioners in *Field* v. *Clark* (143 U. S., 649) and *United States* v. *Ballin* (144 U. S., 1).

The petition addressed to the circuit court, which is supposed to initiate these proceedings, was filed October 27, 1891, and covers pages 1 to 3, inclusive. The order

of Judge Lacombe was filed the same day, and directs the Board of General Appraisers to return to the circuit court—

> The record and the evidence taken by them, together with a certified statement of the facts involved in the case and their decisions thereon respecting the dutiable classification of the merchandise embraced in said petition and application and the rate of duty imposed thereon (p. 5).

At the top of page 6, between two documents and apparently having no connection with anything, appears the following undated matter:

> *To the Board of General Appraisers:*
>
> As to the facts involved in the within specified case, you are hereby notified that the petitioners will present to you evidence at such time and place as you may designate, reasonable notice of such designation being given to their attorneys.
>
> STANLEY, CLARKE & SMITH,
> 120 *Broadway, New York City.*

This is not stated to have been served, or filed, or acted upon; where it came from, or why it is here, is not shown.

Following this in the record, and under date of March 1, 1892, the return of the Board of General Appraisers, made in pursuance of the order above referred to, is set forth at length (pp. 6 to 9, inclusive).

This return sets forth: (A) the report of Special Deputy Collector Couch; (B) the importer's protest; (C) the decision and opinion of the Board, including (p. 9) the separate statement as to the facts.

This decision shows (p. 8, foot) that the merchandise had been appraised by the local appraisers, and was afterwards appraised by one of the General Appraisers, and that an appeal was then taken by the importers to the Board of General Appraisers, which Board fixed a day, and gave reasonable notice, and examined and decided the case, after an appearance made by the appellants. "And that the said Board determined the dutiable value of the merchandise in each of said cases."

The return sets forth, further, the grounds of the finality of the decision, and concludes:

> The appellants were served with reasonable notice of these several hearings after a day fixed therefor, and were cited to appear before this Board and offer evidence to sustain the contentions of fact alleged in the grounds of their protests. This they failed to do, and the Board accordingly adjudges all of said issues against them as confessedly untrue.
>
> The decision of the collector in each case is affirmed.

This is followed by an independent statement, signed by the Board (p. 9), as follows:

> And for a certified statement of the facts involved in said matter, as ascertained by them, the said Board states that said facts are fully set forth in the decision aforementioned, and that no other facts were ascertained by said Board than such as are shown by said decision and other exhibits hereto attached.

March 25, 1892, the United States attorney gave notice of a motion for an order dismissing "the appeal or application for a review" for want of jurisdiction (p. 10).

By an order filed May 18 the motion was granted by Judge Lacombe, the following being the order (p. 10):

> The object of this proceeding is plainly to review the decision of the appraisers as to value. Whether or not any relief can be secured by an importer where there has been fundamental error in fixing the value, it does not seem to be provided for under the administrative act. Motion to dismiss granted.

And by order filed May 19 (p. 11) the appeal and proceedings for review are dismissed for want of jurisdiction.

II.

THE ENACTMENT OF 1890.

The questions involved in this review arise out of certain provisions of the customs administrative act of June 10, 1890 (26 Stat., 131).

By *section* 10 all appraising officers are required to ascertain, estimate, and appraise (without regard to any invoice or affidavit thereto), "by all reasonable ways and means in his or their power," the actual market value, etc.

Section 11 authorizes the appraising officer to "use all available means to ascertain the cost of production" of imported merchandise, the actual market value of which cannot be ascertained to the satisfaction of the appraising officer.

Section 12 provides for the appointment of nine General Appraisers; and for the General Board of Appraisers to serve at the port of New York.

Section 13 provides for the revision and correction by the appraiser of the reports of assistant appraisers, and

for a report to the collector of the value of the merchandise appraised. If the collector deems the appraisement too low he may obtain reappraisement by a General Appraiser. If the importer is dissatisfied he may obtain a reappraisement by one of the General Appraisers. And the decision of the appraising officer "shall be final and conclusive as to the *dutiable value* of such merchandise against all parties interested therein unless "such party shall be dissatisfied, and shall give notice in writing, or unless the collector shall deem the appraisement too low, when, in either case, the collector must transmit the invoice and all the papers appertaining thereto, to the Board of Appraisers on duty at the port of New York, or to a Board of General Appraisers, to be designated by the Secretary of the Treasury, which Board shall examine and decide the case submitted, "*and their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein,*" and the collector is directed to ascertain, fix, and liquidate the *rate and amount* of the duties to be paid, and the dutiable costs and charges.

The remedies provided in *section* 14 are given to the importer only, and are limited to the *rate and amount* of duties including costs, charges, fees, and all other exactions (excluding tonnage duty). And the "decision of the collector" as to all of these things is made final and conclusive unless notice is given in writing to the collector, setting forth distinctly and specifically, in respect to each entry or payment, the reasons for the objections thereto.

Upon such notice and due payment the collector shall transmit the invoice and papers to the Board of General

Appraisers; and this Board is to examine and decide the case, and their decision becomes final and conclusive except where an application shall be filed in the circuit court in accordance with section 15 of this act.

Section 15 allows a review by the circuit court of the decision made by the Board under section 14, and authorizes the importer and the collector, respectively, to procure such review.

It is important to note, however, that this review is limited in terms to a review, "*as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification.*" The review is only "*of the questions of law and fact involved in such decision.*" No authority is granted to disturb or reconsider the final and conclusive decision as to *dutiable value* of the merchandise as determined pursuant to the provisions of section 13.

In a proper case the court, under section 15, may direct the Board to return to the court the record and the evidence taken, and a statement of facts, and their decision; also, further evidence may be taken and returned to the court by a General Appraiser, as an officer of the court, and the whole shall constitute the record upon which the circuit court shall "hear and determine the questions of law and fact involved in *such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification.*"

Section 25 prohibits the bringing of suits against the collector or other officer of the customs on account of any decisions as to classification of merchandise or the duties charged thereon, or collections, or other matter or thing,

as to which the *importer might be entitled to appeal, under this act,* from the decision of the collector, or from any Board of Appraisers.

Sections 10, 13, 14, 15, and 25 of the act of June 10, 1890, are, respectively, as follows:

> SEC. 10. That it shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector, as the case may be, by all reasonable ways and means in his or their power to ascertain, estimate, and appraise (any invoice or affidavit thereto or statement of cost, or of cost of production to the contrary notwithstanding) the actual market value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market value or wholesale price of every of them, as the case may require.
>
> SEC. 13. That the appraiser shall revise and correct the reports of the assistant appraisers as he may judge proper, and the appraiser, or, at ports where there is no appraiser, the person acting ass uch, shall report to the collector his decision as to the value of the merchandise appraised. At ports where there is no appraiser the certificate of the customs officer to whom is committed the estimating and collection of duties of the dutiable value of any merchandise required to be appraised shall be deemed and taken to be the appraisement of such merchandise. If the collector shall deem the appraisement of any imported merchandise too low he may order a reappraisement, which shall be made by one of the general appraisers; or, if the importer, owner, agent, or consignee of such merchandise shall be dissatisfied with the ap-

praisement thereof, and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may, within two days thereafter, give notice to the collector, in writing, of such dissatisfaction, on the receipt of which the collector shall at once direct a reappraisement of such merchandise by one of the general appraisers. The decision of the appraiser or the person acting as such (in cases where no objection is made thereto, either by the collector or by the importer, owner, consignee, or agent), or of the general appraiser in cases of reappraisement, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall, within two days thereafter, give notice to the collector in writing of such dissatisfaction, or unless the collector shall deem the appraisement of the merchandise too low; in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of three general appraisers which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, and the collector or the person acting as such shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law.

SEC. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs

and charges, and as to all fees and exactions of whatever character (except duties on tonnage), shall be final and conclusive against all persons interested therein, unless the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after, "but not before," such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such, who shall liquidate the entry accordingly, except in cases where an application shall be filed in the circuit court within the time and in the manner provided for in section fifteen of this act.

SEC. 15. That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dis-

satisfied with the decision of the board of general appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, they or either of them may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision. Such application shall be made by filing in the office of the clerk of said circuit court a concise statement of the errors of law and fact complained of, and a copy of such statement shall be served on the collector, or on the importer, owner, consignee, or agent, as the case may be. Thereupon the court shall order the board of appraisers to return to said circuit court the record and the evidence taken by them, together with a certified statement of the facts involved in the case, and their decisions thereon; and all the evidence taken by and before said appraisers shall be competent evidence before said circuit court; and within twenty days after the aforesaid return is made the court may, upon the application of the Secretary of the Treasury, the collector of the port, or the importer, owner, consignee, or agent, as the case may be, refer it to one of said general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered by the Secretary of the Treasury, collector, importer, owner, consignee, or agent, within sixty days thereafter, in such order and under such rules as the court may prescribe; and such further evidence with the aforesaid returns shall constitute the record upon which said circuit court shall give priority to and proceed to hear and determine the questions of law and fact involved in such

decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification, and the decision of such court shall be final, and the proper collector, or person acting as such shall liquidate the entry accordingly, unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision by the Supreme Court of the United States, in which case said circuit court, or the judge making the decision, may, within thirty days thereafter, allow an appeal to said Supreme Court; but an appeal shall be allowed on the part of the United States whenever the Attorney-General shall apply for it within thirty days after the rendition of such decision. On such original application, and on any such appeal, security for damages and costs shall be given as in the case of other appeals in cases in which the United States is a party. Said Supreme Court shall have jurisdiction and power to review such decision and shall give priority to such cases, and may affirm, modify, or reverse such decision of such circuit court, and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly. All final judgments, when in favor of the importer, shall be satisfied and paid by the Secretary of the Treasury from the permanent indefinite appropriation provided for in section twenty-three of this act. For the purposes of this section the circuit courts of the United States shall be deemed always open, and said circuit courts, respectively, may establish, and from time to time alter, rules and regulations not inconsistent herewith for the procedure in such cases, as they shall deem proper.

* * * * *

SEC. 25. That from and after the taking effect of this act no collector or other officer of the customs

shall be in any way liable to any owner, importer, consignee, or agent of any merchandise, or any other person, for or on account of any rulings or decisions as to the classification of said merchandise or the duties charged thereon, or the collection of any dues, charges, or duties on or on account of said merchandise, or any other matter or thing as to which said owner, importer, consignee, or agent of such merchandise might, under this act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this act.

III.

THE CERTIFICATE.

The certificate of "the question of jurisdiction," coming from the court below, under section 5 of the act of March 3, 1891 (26 Stat., 826), is set forth at page 13 of the record. The subdivisions follow certain of the allegations of the petition (pp. 2, 3), but can hardly be said to be justified by the specifications of the protest. (Ex. B, p. 7.)

According to the certificate, the questions upon which it is claimed by plaintiff that the board of general appraisers erred are: That the appraising officers did not act upon their own opinions or the evidence before them, but acted upon the opinions of others not experts, nor having personal knowledge in the premises.

That they did not act in accordance with their own judgment, but against their judgment.

That they made additions to the invoice value contrary to their judgment and in accordance with the orders of

the appraiser at New York, who never saw, examined, or appraised said goods.

And also that the board erred—

In allowing a penal duty and in holding that the duty should be assessed at any different rate than that allowed by the invoice.

And that they erred in holding that the action of the appraisers was not under compulsion and void.

IV.

NO QUESTION OF DUTIABLE VALUE CAN BE REVIEWED AND NONE AS TO CLASSIFICATION AND RATE IS INVOLVED.

No question as to the dutiable value of the merchandise imported can be involved here, as the decision under section 13 must have been final and conclusive upon that point. See also *Auffmordt* v. *Hedden*. (137 U. S., 329.)

An examination of the allegations of the petition upon which the question of jurisdiction is certified here by the court below (p. 13) shows that no question "respecting the classification of such merchandise and the rate of duty imposed thereon" is involved. Indeed, all matters relating to dutiable value and to classification and rate are expressly excluded from all consideration upon this appeal.

The motion to advance the hearing of the case before this court frankly states (p. 2):

> III. The petitton states the case of an increase of value, for duty purposes, of imported merchandise, above that stated upon the entry, by an *illegal* appraisement, in that the appraising officers acted

under compulsion and contrary to their own judgment, and in other respects contrary to law (Rec., 13).

IV. Though this case does not, as here presented, raise a question of rate or classification, it presents a more general and important one, as it affects all kinds of imports, irrespective of classification, and affects the importers thereof more seriously, in many instances, than would an ordinary difference as to the rate and classification.

And appellant's brief states (p. 5) the grounds of the contention, as follows:

II.

Basis of petition.

Our petition presents two independent grounds of complaint: one that the *appraisements* were illegal, and the other that the penalty was *illegally* exacted.

Of what nature then are those questions which plaintiffs seek to have reviewed by the court?

It is manifest that they are alleged errors which, if they exist at all, exist outside of statutory valuation, and outside of the appraisement prescribed by the statute.

In *Auffmorth* v. *Hedden* (137 U. S., 310, 328) several instances of successful suits brought by importers on account of errors occurring outside of the appraisal prescribed are cited—to wit, that of substituting a new merchant appraiser for one already selected, *Greely* v. *Thompson* (10 How., 225); that of the failure of the appraiser to see the original packages, *Greely's Administrator* v. *Burgess* (18 How., 413); the case of a merchant appraiser

not duly qualified, *Oelbermann* v. *Merritt* (123 U. S., 356), and *Mustin* v. *Cudwalader* (*id.*, 369); and that where an amount equal to a reduction made in the valuation of the cases inclosing the goods was added to the admitted value, as in *Badger* v. *Cusimano* (130 U. S., 39).

Under the law as it was formerly recognized to exist, it was said in *Robertson* v. *Frank Brothers Co.* (132 U. S., 17, 24):

> It is undoubtedly the general rule that the valuation of merchandise made by the appraiser, unappealed from to merchant appraisers, is conclusive. But whilst this is the general rule, it is subject to the qualification that if the appraiser proceed upon a wrong principle, contrary to law, and this be made to appear, his appraisement is not unimpeachable. This qualification applies to the acts of many other officials charged with duties of a similar character, such as assessors of the value of property for taxation, commissioners for appraising lands taken for improvements, or damages sustained by owners of land, and the like.

In the case at bar the plaintiff claims that the appraising officers were improperly influenced, and did not act in accordance with their own judgment, but acted contrary thereto, and appraised in obedience to orders of an official who never saw the goods, and this in the ascertainment of dutiable value.

Admitting all this for the purposes of the argument, and that such an "appraisement is not unimpeachable,"—it by no means follows that the importer has any remedy under section 15 of the act of 1890, or that the circuit court has, under that act, any authority to review as to errors of the nature complained of.

V.

DOES THE ACT OF 1890 PRECLUDE THE IMPORTER FROM BRINGING ANY SUIT WHATEVER AGAINST THE COLLECTOR OR APPRAISING OFFICERS?

As neither dutiable value nor classification and rate are involved in this case, but (admitting so far plaintiff's contention) only alleged illegal and unauthorized acts committed outside of the statutory and prescribed procedure of appraisement, it is submitted that no appeal lies under said act.

A.

It may be urged that without the establishment of the legality of appeals like this an injured importer will be without remedy; but if this were so Congress and not the courts should be called upon to provide the remedy.

B.

While it may not be necessary to determine that question in this case, it may appear when the proper case is presented not only that no appeal is allowed in the cases designated under the act of 1890, but that, therefore, no prohibition exists against the bringing of a suit against the collector by the importer in such cases.

Plaintiff's council claims (Brief, p. 13, middle) that the application of the importer to the circuit court under section 14 of the act of 1890 "is the equivalent of a suit against the collector."

An inference seems to be drawn that such right of review by the circuit court excludes all right to bring any suit against the collector although the exaction was affected by errors arising outside of the valuation and of the appraisement prescribed by statute.

C.

As the question thus raised may be deemed of some consequence, the history of the statutes upon which the right to bring suit has been rested, although several times pointed out by this court, may be recalled.

In other cases before this court it has been the contention of the importer that the right to sue the collector came to an importer by inheritance under the precedents of the English law; and in this connection citations have been made to Lord Mansfield's decision in *Hall* v. *Campbell* (1 Cowper, 205).

See also *Stevenson* v. *Mortimer*, 2 *Cowp.*, 805; *Champlin* v. *Bullman*, *Parker's Rep.*, 198; *Snowdon* v. *Davis*, 1 *Taunt.*, 359; *Irving* v. *Wilson*, 4 Term, R., 485; *Buller* v. *Harrison*, *Cowp.*, 565; *Elliott* v. *Swartwout*, 10 *Peters*, 157; and this common law has prevailed in State courts in actions against United States officials. *Ripley* v. *Gelston*, 9 *Johns.*, 201; *Clinton* v. *Strong*, *ib.*, 370.

Mr. Cushing, while acting as counsel for the importer in *Curtis's Administratrix* v. *Fiedler* (2 Black, 472), said that:

> Prior to 1845 there was no law requiring the protest to be made in writing, or to specify the objections. The necessity of written protests and specific objections led to the provision in the act of that date.

In *Barney* v. *Watson* (92 U. S., 449) Mr. Justice Bradley, in delivering the opinion of the court, gives a brief history of the act of February 26, 1845 (5 Stat., 727), as follows:

> The case of *Elliot* v. *Swartwout* (10 Pet., 137), decided in 1836, affirmed the principle which had been established by previous authorities, that money paid to a collector for duties illegally demanded, if paid under compulsion, in order to get possession of the party's goods, or to prevent their being seized for the duties, may be recovered against the officer in an action at common law, provided the payment be made under protest and with full notice of the intent to sue, so that the officer may protect himself by retaining the money in his possession; but that a payment voluntarily made without such protest can not be recovered back. The embarrassment which ensued in consequence of the large amount of duties withheld from the public Treasury by Mr. Swartwout, the defendant in that case, induced the passage of an act in 1839 (5 Stat., 348, sec. 2) which required all duties collected to be paid into the Treasury without regard to claims for overcharge, and deprived the party of an action at law by giving him the specific remedy of an appeal to the Secretary of the Treasury. This was held to be the effect of the act, although not its express terms, as may be seen by a reference to the case of *Cary* v. *Curtis*, reported in 3 Howard, 236. In 1845 the right of action was restored by an act passed to explain the act of 1839.

The act of 1845 is entitled "An act explanatory," etc., and is a construing act. It introduces no subject or element new to the law, unless it is as to the method of protesting. It declares the construction to be placed upon section 2 of the act of 1839.

It declares that nothing contained in said section 2—

> shall take away or be construed to take away or impair the right of any person or persons who have paid or shall hereafter pay money as and for duties under protest to any collector * * * in order to obtain goods * * * imported by him * * * which duties are not authorized * * * by law to maintain any action at law against such collector * * * to ascertain and try the legality and validity of such demand and payment of duties.

Then follows the provision:

> Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector to recover the amount of duties so paid under protest, unless the said protest was made in writing and signed by the claimant at or before the payment of said duties setting forth distinctly and specifically the grounds of objection to the payment thereof.

Section 14 of the act of June 30, 1864 (13 Stat., 214), recognizes and places limitations upon the right of importer to bring suit.

The foregoing legislation is referred to by this court in *Schell's Exrs.* v. *Fauché* (138 U. S., 562, 564); and in *Heinze* v. *Arthur's Exrs.* (144 U. S., 28, 32).

The right to bring suit under the statutes was carried into the Revised Statutes, as shown in sections 3011, 2931, and 2932.

Each of these three sections is specifically repealed by section 29 of the act of June 10, 1890, as well as "all

other acts and parts of acts inconsistent with the provisions" of said act.

The question is respectfully submitted to this court whether it will now determine whether these repeals, and the enactment of sections 14, 15, and 25 of the act of 1890 render null and void the provisions of the act of 1845 declaring the right of suit; and also whether the common law right of suit is abrogated.

Section 25 of the act of 1890 protects the collector from suit only in those cases where the importer "might under this act, be entitled to appeal from the decision of said collector or other officer, or from any board of appraisers provided for in this act."

Therefore it may remain to be determined whether the importer, as to the class of cases under consideration—those outside of the valuation, and those outside of the classification and rate—is or is not excluded from testing such claims in the courts.

VI.

THE THING COMPLAINED OF IS THE DECISION OF THE BOARD AS TO DUTIABLE VALUE.

By section 13 the decision of the board as to the dutiable value of merchandise is final and conclusive.

All of the seven allegations, or grounds set forth in the certificate of Judge Lacombe (p. 13), grew out of and relate to the ascertainment of dutiable value.

The decision of the board shows (p. 9, top) that the question is one of dutiable value. The court says (p. 10,

middle): "The object of this proceeding is plainly to review the decision of the appraisers as to value."

The court below properly refused to review the decision of the board as to dutiable value of the gloves.

VII.

THE INTENT OF CONGRESS.

Counsel representing the importer has referred to statements made in debate by legislators while the administrative customs act was under consideration.

It is pointed out in *American Net and Twine Company* vs. *Worthington* (141 U. S., 473), citing several cases, "that while the statements made and the opinions advanced by the promoters of the act in the legislative body are inadmissible as bearing upon its construction, yet reference to the proceedings of such body may properly be made to inform the court of the exigencies," etc.

Answering the reference made by counsel, and following the permission above suggested, counsel for the United States begs to make reference to declarations and proceedings occurring in Congress in connection with the formulation and enactment of this law relating to customs administration.

It is shown by the remarks made by Mr. McKinley (Congressional Record, Fifty-first Congress, first session, Vol. 21, Part 1, p. 809) that the act in question was the result of the work of many distinguished legislators, members respectively of the two great political parties, whose labors were performed in the respective Houses and during different Congresses. The debates in the two

Houses disclose that the advice of several Secretaries of the Treasury and of experienced importers and merchants was received.

The questions covered by sections 13, 14, and 15 of the law as finally enacted were debated at length in the House of Representatives (pp. 817 to 820, 825 to 833).

The right of the importer to bring suit at common law previous to the statute of 1839 is admitted, and the conclusiveness and finality of the decision of the appraising officers, as to the valuation of imported merchandise, is declared to have become the established and settled rule under the laws.

In the Senate, sections 14 and 15 are debated at considerable length, and the discussion of the questions involved, directly or indirectly, in this case, is both interesting and instructive. (*Ibid*, Part 4, pp. 3974, 3975 and 4004 to 4023, and *Ibid*, Part 5, pp. 4113 to 4128.)

As shown on page 4017, Part 4, Mr. Senator Gray submitted an amendment intended to provide for a trial by jury as to questions coming under section 15, which amendment was not adopted.

He says:

> The amendment which I have offered restores the right of bringing a common-law suit expressly under the provisions and limitations that have heretofore obtained, and are prescribed by sections 3011 and 3012 of the Revised Statutes.

In debating this proposition, Mr. Senator Evarts indicated the distinction which exists between those questions arising in the appraisement prescribed by the statute and those which may occur outside of such appraisement.

He said (p. 4018):

> I am opposed to any system that precludes a trial in a court of the question of right whether the law has been enforced by the exactions under it or whether what may be called a usurpation has exacted an improper amount.

He then refers to the method provided by the bill for reaching the circuit court, and continues:

> The committee have added to that faculty the power of the court to appoint as an officer of the court one of these appraisers, who shall have the authority, as I understand it, of a referee or examiner under the eye and as an officer of the court. That I leave to stand, and only in two respects do I find it important to change the text as it now reads: One is to provide that all this matter then before the court shall be a part of its record, if you choose to call it so, but that it shall not be all the record; and my amendment provides "and upon such other testimony as the court may think necessary," and thereupon after that addition by the methods of the court to get evidence which are not restricted because it is such testimony as the court may think necessary, after these forms of information are exhausted, thereupon the court shall proceed to determine according to law the questions of classification and rate.

He had said previously, on the same day (p. 4007):

> I have given the greatest attention, with solicitude and with many consultations with the merchants of New York, and have desired that they should be made to understand the discrimination between the process of exaction and the process by which the law can be appealed to through the courts under the Constitution to rectify what is wrong in exaction.

> But I never have undertaken, and could not have, with my intelligence of the subject or my view of this broad distinction between the exaction of a tax or duty and an appeal to the courts, to decide whether this exaction or this duty was contrary to law.

The "statement of House conferees," submitted with the conference report, May 27, 1890, recognizes the intent of limiting the review under section 15 to questions of classification and rate.

The "statement" explains (*Ibid*, part 6, p. 5341), as follows:

> In section 14, the amendments are made to correspond with those in section 13 in reference to places where the board of appraisers shall be on duty.
>
> Section 15 relates to the referring of cases to the United States circuit court. The court is given jurisdiction not only as to the construction of the law, but the facts respecting classification and the rate of duty imposed under such classification connected with the matter in dispute by the Senate amendment.

The report made from the Committee on Ways and Means (H. R., January 14, 1890), with the customs administrative bill (Rep. 6, Vol. 1, Fifty-first Congress, first session), sets forth the purposes of the act.

On pages 6 to 8 of this report the views of the committee upon sections 14 and 15 of the act are presented.

The report says:

> Sections 14 and 15. These sections are substituted for sections 2931 and 2932, Revised Statutes, and are in substance the same as were contained in the bill familiarly known as the "undervaluations bill," which passed the Senate at the first session of the Fiftieth

Congress, after a full discussion, and practically without division. The Senate committee having the bill in charge reported as follows, with respect to these two sections:

"It will be seen that the proposed sections are a radical departure from the existing law. They substitute for the decision of the Secretary of the Treasury, in all cases of appeal upon questions of classification and rate of duty and upon questions as to fees, charges, and exactions, the decision of the board of appraisers provided for in the preceding section, and confer upon said board in the first instance exclusive jurisdiction of all said questions. They confer upon the several circuit courts of the United States appellate jurisdiction upon all questions of law as respects classification and rate of duty, with a final determination by the Supreme Court of the United States in difficult cases, or in cases where the Attorney-General shall be of opinion that the matter in controversy should be appealed thereto.

"The intent and purpose of these two sections is to afford the importer and the Government a speedy decision upon every question of law and fact that can arise as respects the proper classification of merchandise and the rate of duty to be charged thereon. It is believed that these two sections together will render substantial justice to the importer and to the Government.

"Previous to 1839 a person paying duties claimed by him to have been illegally exacted had a common-law right of action against the collector to whom the payment had been made, provided the person making such payment gave notice at the time of payment that the duties charged were too high, and that the party paying so paid in order to secure possession of his merchandise, and that he intended to sue to recover

back the amount so erroneously paid, and provided that he also gave notice to the collector not to pay over the amount into the Treasury."

Reference is then made to the case of *Carey* v. *Curtis*, and to the act of 1845, and the report, still quoting from the antecedent Senate report, continues:

"And this provision continued in force until June 30, 1864, when the sections 2931 and 2932, were enacted, since which time importers have been compelled to resort to the statutory remedy therein provided, and by said sections the common-law remedy which existed up to that time was taken away.

* * * * *

"Under the present system all questions of classification and rate of duty are submitted to the Secretary of the Treasury upon appeal from the decision of the collector when the importer is dissatisfied with such decision. It is manifestly impossible for the Secretary of the Treasury, or for any assistant secretary of the Treasury, to give personal detailed consideration to these appeals, except in rare and important cases; therefore, from necessity there has grown up in the Treasury Department a bureau or division of the Secretary's office which examines all these cases, and consequently in practice most of them are made up and decided by a chief of division in the Treasury Department, his decision, of course, being reviewed, but generally in a perfunctory way, either by the Secretary himself or by one of the assistant secretaries.

"In the opinion of the committee, a board such as is provided for by the sections under consideration, sitting at the place of importation, and having

easy access to all the facts and circumstances surrounding the case, including a view of the merchandise, could give much more intelligent consideration to the questions involved than could subordinates in the Treasury Department located in Washington."

It is respectfully submitted that it was the intent of Congress to make the decision of the appraising officers as to dutiable value final and conclusive as it always had been, and to provide for no questions or classes of questions by section 15 other than those arising legitimately, and in accordance with statutory procedure, in determining classification and rate.

If an importer shall be shown to have suffered from some wrongful or unauthorized act, from some act outside of the valuation and outside of the prescribed appraisement, some exaction which "may be called a usurpation," he ought not, surely, to be left remediless; but it seems to be clear that he is given no remedy under the act of June 10, 1890.

VIII.

ADDITIONAL DUTIES, MISCALLED PENALTIES.

(See 5 Stat., 548, sec. 17; 9 Stat., 43, sec. 8; 13 Stat., 494, sec. 7; R. S., sec. 2900.)

Section 7 of the customs administrative act provides that the importer of merchandise actually purchased may, at the time of entry, make such addition to the invoice value as in his opinion may raise the same to the actual market value of the merchandise in the principal markets

of the country from which the same has been imported; and it is further provided that—

> If the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued.

(1) This increase of duty is not a penalty, but an additional duty, and this construction is in accordance with the established and accepted practice of the Treasury Department.

(2) It is a "further sum" of precisely the same character, kind, and nature as the original duty prescribed.

(3) If this additional duty were to be held to be within the "dutiable value" found the decision of the appraisers would be final and conclusive, under section 13.

(4) It is manifest that it is not within the classification and rate, therefore it is not an independent or sufficient subject of appeal to the circuit court under section 15.

(5) This additional duty is not an element of the appraisement or of the conclusion or finding of the appraisers.

It is an additional duty, resultant from and declared by the law, which comes into existence and becomes fixed by force of the enactment.

It requires no procedure on the part of the officers of the Government, aside from a mere computation and an application by the collector.

The circuit court has no jurisdiction over such a question under section 15.

IX.

DUPLICITY.

The certificate certifying the question of jurisdiction to this court, under section 5 of the circuit court of appeals, act of March 3, 1891, was filed June 9, 1892 (p. 14).

A formal appeal was also taken to this court in the case, the notice whereof bears date June 9 and was filed June 10 (*id.*).

A notice or petition to the Supreme Court of the United States of such appeal is also made, dated on said 9th, appealing from the judgment of the circuit court dismissing the proceedings for want of jurisdiction, which petition makes reference to the certification.

This appeal was formally allowed by the circuit judge, and these papers were filed on June 10 (p. 15). Then follows an assignment of errors, filed on the same day.

The United States attorney joins issue, and a bond for costs is given and approved (pp. 16, 17); and a citation by Judge Lacombe follows.

Plaintiff's counsel states his case (Brief, p. 1–3) as resting upon the jurisdictional question under the act of March 3, 1891, and then adds (p. 3, foot): "In addition to this certification, a regular appeal was taken and allowed from the judgment of dismissal (Rec., 15)." The brief, at the

top of page 4 indicates that the counsel relies mainly upon the proceeding by certification.

The brief also says (p. 43) that "the record before this court, certified by the court below, serves the purposes of a *certiorari* and of a writ of error * * *."

It is respectfully submitted that the duplicate proceedings for review produce, unjustifiably, the embarrassments which arise from legal duplicity.

If counsel is sustained in his practice and conclusions, he is before this court upon, first, a certificate of a jurisdictional question, and second, upon an appeal; and rests upon a record which he assumes, "serves the purposes of a *certiorari* and of a writ of error." * * *

THE APPEAL IS UNAUTHORIZED BY LAW, AND VOID.

The petition of appeal alleges in effect (p. 15) that the granting of the motion dismissing the proceedings for review before the circuit court was a final decree and an appeal is sought to be taken to this court to reverse such judgment.

It is necessary to assume that this so-called appeal is sought to be taken under section 15 of the act of June 10, 1890.

By said section 15 (middle) the circuit court is to review the decision of the board of appraisers, "and proceed to hear and determine the questions of law and fact involved in such decision, respecting the classification of such merchandise and the rate of duty imposed thereon under such classification." The enactment continues:

> And the decision of such court shall be final, and the proper collector, or person acting as such, shall

> liquidate the entry accordingly, unless such court shall be of opinion that the question involved is of such importance as to require a review of such decision by the Supreme Court of the United States, in which case said circuit court, or the judge making the decision may, within thirty days thereafter, allow an appeal to said Supreme Court; but an appeal shall be allowed on the part of the United States whenever the Attorney-General shall apply for it within thirty days after the rendition of such decision. On such original application, and on any such appeal, security for damages and costs shall be given as in the case of other appeals in cases in which the United States is a party. Said Supreme Court shall have jurisdiction and power to review such decision, and shall give priority to such cases, and may affirm, modify, or reverse such decision of such circuit court, and remand the case with such orders as may seem to it proper in the premises, which shall be executed accordingly.

The foregoing is the only provision for review by this court that the act in question contains.

It is manifest that such review by the Supreme Court relates back to the decision made by the board, because the circuit court has authority to review only the questions "involved in *such decision*."

It is manifest, also, that the only question upon which an appeal may be had to this court under that section is upon the same "question involved," which is a question respecting the classification and rate.

And it is manifest that a question involving nothing but the jurisdiction of the court below can not be reviewed here upon an appeal under section 15.

Obviously the appeal is not under the act of Feb. 25, 1889 (25 Stat., 693).

First. Because the "final judgment or decree" mentioned in that act, it is submitted, does not include this order granted upon a motion made for dismissal.

Second. Because the petition of appeal (p. 15) prays "that said circuit court may certify to the Supreme Court of the United States without delay the question of jurisdiction of said court," and because said circuit court did, apparently as a part of the same proceedings and by the appellant's procurement, certify the jurisdictional question, which is the sole one, to the Supreme Court of the United States under the act of March 3, 1891 (p. 14, top).

An absurdity is plainly involved in an assumption that the appellant comes here by way of the two acts of February 25, 1889, and March 3, 1891. Any other review should go to the circuit court of appeals.

As the proceedings of review relate in terms to the fifth section of the act of March 3, the other is excluded; and as no appeal is allowed in a case like this under the act of June 10, 1890, no legal or valid appeal exists in the case before us, and the case comes on certification, and not otherwise.

It is respectfully submitted that the duplicate presentation of this case by certificate, and by appeal, is unauthorized by law and tends to unnecessary confusion, and is inconsistent with orderly procedure. See *McLish* v. *Roff* (141 U. S., 661).

LASTLY.

It is respectfully submitted that the appeal to this court should be dismissed; and also, that the order of dismissal granted by the circuit court should be approved.

A. X. PARKER,
Assistant Attorney-General.

FEBRUARY 15, 1893.

Supreme Court of the United States,

OCTOBER TERM, 1892.

PASSAVANT & Co. (Fredericke S. Passavant *et als.*),
Appellants,
AGAINST
THE UNITED STATES.
No. 1118.

SUBMITTED UNDER RULES 32 AND 6.

Appellants' reply brief.

A few words of reply to the Attorney General's brief may aid to bring out distinctly the matters with reference to which we are at issue; eliminating all such extraneous and immaterial considerations as whether the importations were gloves or shoe blacking; whether or not there was a bill of particulars (which no statute requires); as well as those long ago passed upon, with reference to the constitutionality of the tariff. (See Atty. Gen.'s brief, pp. 2 to 4.)

The certification of the Court passes everything else by, and submits the jurisdictional question whether or not it would be *competent* to receive and act upon evidence to sustain "*these allegations*" which it specifies —leaving all the others unsubmitted. (Rec. 13.)

If the Circuit Court had *power* to admit *any* testimony tending to prove what is charged in "these allegations," and to determine according to the *weight* of the evidence adduced thereon, then that Court conceded its dismissal of our petition to be erroneous.

Coming to the Attorney-General's analysis (his brief pp. 5 to 13) of the administrative act of June 10, 1890, we note its tenth section to be, so far as this case is concerned, *precisely the same as R. S. sec. 2902.*

With sec. 11 we have naught to do here. The customs-officers' action and "these allegations" of ours relate exclusively to *value*, and not to "cost of production."

Sec. 12 creates the new Board, to discharge old functions, conformably to existing methods; with a hope of attaining more accurate, and certainly more uniform results.

Sec. 13 is the equivalent of R. S. secs. 2615 *et seq.* in its opening provision; and as to that portion which the Attorney-General (His brief p. 6) quotes, with the emphasis of italics, it is an *exact* reproduction of the language of pre-existing law.

It is chiefly to display this identity by parallelism that this reply-brief is prepared; although it is stated, in narrative form, in our opening brief, pp. 12 and 13.

Revised Statutes.	Act June 10, 1890.
"Sec. 2902. It shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector and naval officer, as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate and appraise the true	"Sec. 10. That it shall be the duty of the appraisers of the United States, and every of them, and every person who shall act as such appraiser, or of the collector, as the case may be, by all reasonable ways and means in his or their power to ascertain, estimate, and appraise (any invoice or

and actual market-value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise, at the time of exportation, and in the principal markets of the country whence the same has been imported into the United States, and the number of such yards, parcels or quantities, and such actual market-value or wholesale price of every of them, as the case may require."

"SEC. 2929. The principal appraisers shall revise and correct the report of the assistant appraisers, as they may judge proper, and report to the collector their decision thereon. If the collector deems any appraisement of goods too low, he may order a reappraisement, either by the principal appraisers, or by three merchants designated by him for the purpose, who shall be citizens of the United States; and may cause the duties to be charged accordingly."

(MEM.—This was act of May 28, 1830, § 2:)

affidavit thereto, or statement of cost, or of cost of production to the contrary notwithstanding) the actual market-value and wholesale price of the merchandise at the time of exportation to the United States, in the principal markets of the country whence the same has been imported, and the number of yards, parcels, or quantities, and actual market-value or wholesale price of every of them, as the case may require."

"SEC. 13. That the appraiser shall revise and correct the reports of the assistant appraisers as he may judge proper, and the appraiser, or, at ports where there is no appraiser, the person acting as such, shall report to the collector his decision as to the value of the merchandise appraised. At ports where there is no appraiser, the certificate of the customs officer to whom is committed the estimating and collection of duties, of the dutiable value of any merchandise required to be appraised, shall be deemed and taken to be the appraisement of such merchandise. If the collector shall deem the appraisement of any imported merchandise too low he may order a re-appraisement, which shall be made by one of the gen-

Sec. 2930 (being proviso of act of Aug. 30, 1842, § 17). "If the importer, owner, agent, or consignee, of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and *the appraisement thus determined shall be final*, and deemed to be the true value, and *the duties shall be levied thereon accordingly*."

eral appraisers, or, if the importer, owner, agent, or consignee of such merchandise shall be dissatisfied with the appraisement thereof, and shall have complied with the requirements of law with respect to the entry and appraisement of merchandise, he may, within two days thereafter give notice to the collector in writing, of such dissatisfaction, on the receipt of which the collector shall at once direct a re-appraisement of such merchandise by one of the general appraisers. The decision of the appraiser or the person acting as such (in cases where no objection is made thereto, either by the collector or by the importer, owner, consignee, or agent), or of the general appraiser in cases of re-appraisement, *shall be final and conclusive as to the dutiable value of such merchandise* against all parties interested therein, UNLESS the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall within two days thereafter give notice to the collector in writing of such dissatisfaction, or unless the collector shall deem the appraisement of the merchandise too low, in either case the collector shall transmit the invoice

and all the papers appertaini ng thereto to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, and the collector or the person acting as such shall ascertain, fix and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law."

Comparison of the text of the fourteenth section of of the act of June 10, 1890, given below and at top of the tenth page of the Attorney-General's brief, shows that, by the accidental omission of three little particles ("and as to") in his synopsis of it, at the bottom of his sixth page, his statement there of its effect is erroneous in a vital particular.

REVISED STATUTES.

"SEC. 2931. (June 30, 1864.) "On the entry of any vessel or of any merchandise, the decision of any collector of customs at the port of importation and entry as to the rate and amount of duties to be paid on the tonnage of such vessel, or on such merchandise, and the dutiable costs and charges thereon, *shall be final and conclusive* against all persons interested therein, unless the owner, importer, etc., of the merchandise, in the case of duties levied on merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury. The decision of the Secretary on such appeal *shall be final and conclusive;* and such vessel, or mer-

ACT OF JUNE 10, 1890.

"SEC. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise, including all dutiable costs and charges, and *as to all fees and* EXACTIONS of whatever character (except duties on tonnage), *shall be final and conclusive* against all persons interested therein, UNLESS the owner, importer, consignee, or agent of such merchandise, or the person paying such fees, charges, and exactions other than duties, shall, within ten days after, "but not before" such ascertainment and liquidation of duties, as well in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such *fees, charges, and* EXACTIONS, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon. Upon such notice and payment the collector shall transmit the invoice and all the

chandise, or costs and charges, shall be liable to duty accordingly, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal," etc. etc. . . .

"SEC. 2932 (June 30, 1864). "The decision of the respective collectors of customs as to all *fees, charges,* and *exactions of whatever character*, other than those relating to the rate and amount of duties to be paid on the tonnage of any vessel, or on merchandise and the *dutiable* costs and charges thereon, claimed by them, or by any of the officers under them, in the performance of their official duty, shall be *final and conclusive* against all persons interested in such fees, charges, or exactions, unless the like notice that an appeal papers and exhibits connected therewith to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them, *shall be final and conclusive* upon all persons interested therein, and the record shall be transmitted to the proper collector or person acting as such who shall liquidate the entry accordingly, EXCEPT *in cases where an application shall be filed in the circuit court within the time and in the manner provided for in section fifteen* of this act."

"SEC. 15. That if the owner, importer, consignee or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the board of general appraisers, as provided for in section fourteen of this act, as to the construction of the law and the facts respecting the classification of such merchandise and the rate of duty imposed thereon under such

will be taken from such decision to the Secretary of the Treasury shall be given within ten days from the making of such decision, and unless shall appeal shall actually be taken within thirty days from the making of such decision, and the decision of the Secretary of the Treasury shall be *final and conclusive* upon the matter so appealed, unless suit shall be brought for the recovery of such fees, charges, or exactions, within the period as provided for in the preceding section in regard to duties." . . . . .

classification, they or either of them, may, within thirty days next after such decision, and not afterwards, apply to the circuit court of the United States within the district in which the matter arises, for a review of the questions of law and fact involved in such decision." . . . .

The residue of this section simply details the form and method of application ;—being "THE MANNER" mentioned at the close of the preceding section, *supra.*

The foregoing parallel is inserted to attract attention to this point ;—that, *in the legislation prior to June 10, 1890, the right to a judicial review of the legality of an appraisement and valuation for duty was nowhere given, specifically and in terms ;—yet it has been continuously exercised under it, for fifty years.*

The language of the revision will be seen to be practically (and almost literally) identical with that of the act of 1890, in this respect ; yet, *it is contended that phraseology construed for half-a-century as conferring this right upon importers denies it to us now.*

EDWIN B. SMITH,
120 Broadway, New York,
Of counsel for appellants.

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RETURN TO RULE TO SHOW CAUSE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

NO. 11. ORIGINAL.

EX PARTE: IN THE MATTER OF JOHN B. SANBORN, PETITIONER.

ON PETITION FOR A WRIT OF MANDAMUS.

RETURN FILED JANUARY 26, 1893.

COURT OF CLAIMS.

To the Supreme Court of the United States:

In the matter of the petition for writ of mandamus by John B. Sanborn, No. 11, original, Oct. term, 1892.

The chief justice and judges of the court of claims, in answer to the order of the Supreme Court of January 16, 1893, directing them to show cause why a writ of mandamus should not be granted as prayed for in said petition, respectfully make answer thereto:

On July 7, 1892, in vacation, said Sanborn filed an application for appeal, which, after careful consideration, the chief justice denied for reasons stated in his opinion. (27 Ct. Cls., 485.) Subsequently said Sanborn made a motion that an appeal be allowed on said application by the full bench, notwithstanding its disallowance by the chief justice.

This motion was heard before a full bench, as prayed for, and was argued on the 2d and 3d days of November, 1892. The court adhered to the order of the chief justice, in vacation, denying the application, and overruled the prayer.

The chief justice and judges declined to allow said application for appeal on the ground that no appeal lies in cases like that of the claimant, in which there was no judgment entered, but only a conclusion of law which is reviewable by the Secretary of the Interior. These reasons are more fully stated in the opinion. (27 Ct. Cls., 485.)

January 25, 1893.

WILLIAM A. RICHARDSON,
Chief Justice.
CHARLES C. NOTT,
LAWRENCE WELDON,
JOHN DAVIS,
STANTON J. PEELLE,
Judges.

(Indorsed on cover:) Supreme Court U. S. October term, 1892. Term No. 11. Original. Ex parte: In the matter of John B. Sanborn, petitioner. Return to rule to show cause. Filed Jan'y 26, 1893.

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Office Supreme Court U. S.
FILED,
JAN 16 1893
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

In the Matter of the Petition of JOHN B. SANBORN for a Writ of Mandamus on the Judges of the Court of Claims, commanding them to allow an appeal from a certain judgment of said Court.

Brief in Support of Motion for Leave to File Petition for Writ of Mandamus and for a Rule to Show Cause.

CHARLES KING,
GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Petitioner.

H. L. McQUEEN, PRINTER.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

In the matter of the petition of JOHN B. SANBORN for a writ of Mandamus on the Judges of the Court of Claims, commanding them to allow an appeal from a certain judgment of said Court.

Motion for Leave to File Petition for Writ of Mandamus and for a Rule to Show Cause.

Now comes John B. Sanborn, the petitioner herein, by his attorneys, and moves this Honorable Court for leave to file the accompanying petition for a writ of mandamus, and for a rule on the Judges of the Court of Claims, requiring them to show cause, on or before a certain date, to be named in said rule, why the writ of mandamus should not be granted as prayed.

Brief in Support of Above Motion.

1. Summary Statement of the Question.

The petition which this motion asks leave to file involves the question whether an appeal is allowable from the judgments and decisions of the Court of Claims under § 12 of the Act of March 3, 1887, entitled "An Act to provide for the bringing of suits against the Government of the United States," 1 Supp. Rev. Stat. 2d Ed. 559.

That section is as follows:

"SECTION 12. That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted."

The appeal is claimed under section 9 of the same act, which is in these words:

"SECTION 9. That the plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes."

The learned Chief Justice of the Court of Claims, in his opinion accompanying the order entered by him at Chambers, denying the appeal (which order was subsequently affirmed by the full bench) placed his denial of the appeal upon the following grounds:

1. That § 9 of the act of 1887, gives no right of appeal from anything but a judgment.

2. That the conclusions of law, upon the findings of fact, entered by the court in proceedings under § 12 of the act of 1887 do not constitute a judgment.

To this we reply as follows:

1. The right of appeal given by § 9 of the act of 1887 is not confined to judgments, but is, by the express terms of the act, allowable "in any suit" under the act.

2. The decision of the Court of Claims under § 12 of the act of 1887 constitutes a judgment within the strictest technical meaning of that term.

2. Right of Appeal not Limited to "Judgments."

The 9th section quoted from the act of March 3, 1887, specifies the cases in which an appeal is granted. The words used are "in any suit." If this is a suit, an appeal is allowed. The legal definition of the word "suit" was settled by this court as far back as the case of *Weston* v. *Charleston*, 2 Pet. 464, where Chief Justice Marshall thus defines it:

"The term is certainly a very comprehensive one and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit." (See also ex parte *Milligan*, 4 Wall. 2, 112, 113; *Aldrich* v. *Ætna Company*, 8 Wall. 491; Black's Law Dictionary, *s. v.*)

Whenever Congress, either by a general or a special law, provides for the submission of a claim against the United States to any of the courts of the United States, whatever the status of the case may have been, before the reference to the court, it then becomes a suit against the United States, within the meaning of all well considered authorities; and all the provisions of law and rules of decision applicable to suits, from that moment attach to such a claim.

The right of appeal granted "in any suit" is not wholly unlimited. It is the right "now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained." The statute on that subject is Rev. Stat. § 707, as follows:

"SEC. 707. An appeal to the Supreme Court shall be allowed, on behalf of the United States, from all judgments of the Court of Claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000, or where his claim is forfeited to the United States by the judgment of said court, as provided in § 1089 [1086]."

Appeals in cases under this act may be thus limited by the statutory amount in controversy, or by any condition not defeating the fundamental object of the words, "in any suit." But the whole scope of those words would be defeated if any words imported from another statute were allowed to take away the right of appeal in a whole class of suits brought under this act,—as for instance, those brought under section 12. "Any suit" means any suit brought under any section of the act. Even if "judgments" are not rendered in suits under section 12, full force and effect can only be given to the words "in any suit" by reading both statutes together, and allowing an appeal in suits under either section of the act of 1887.

While the general course of legislation has confined the appellate jurisdiction to cases of final judgments and decrees, there is no constitutional necessity that it be limited to that class of decisions. Wherever Congress can constitutionally confer original jurisdiction upon any inferior court, it may equally confer appellate jurisdiction upon this court. The original jurisdiction of this court is strictly limited by the Constitution and can not be enlarged by Congress; but there is no such restraint upon

its appellate jurisdiction, which is co-extensive with all the subjects of federal judicial power, and is to be only "with such exceptions, and under such regulations as the Congress shall make."

In point of fact, the judicial power of this court has extended, and extends to-day, to many subjects other than final judgments or decrees. Almost from the beginning it has had jurisdiction in cases of certificates of division of opinion between the judges of the circuit courts. (Rev. Stat. §§ 651, 693, 697.) By the Customs Administrative Act of 1890 (1 Suppl. Rev. Stat. 2d Ed., page 744; § 15, pages 751–752), the Circuit Courts of the United States are to review the decisions of the Board of General Appraisers, and the decisions of those courts are reviewable upon appeal to this court.

Such decisions are not enforcible by any provision in the nature of an execution, and the action of the Circuit Court in certifying them to the Secretary of the Treasury, does not seem to differ in form or effect from that of the Court of Claims in proceedings under § 12 of the act of 1887.

The recent judiciary act of March 3, 1891 (1 Suppl. to Rev. Stat. 2d Ed. page 901) is full of provisions for the exercise of appellate power in cases of other than final judgments or decrees.

By § 6 of that act, any Circuit Court of Appeals may certify to this court any question or proposition of law concerning which it desires instructions. By § 7, appeals may be taken from interlocutory orders or decrees in equity.

The limitation of the right of appeal to cases of final judgments or decrees is thus seen to be of purely statutory origin, and not a constitutional restriction upon the appellate jurisdiction of this court.

3. "Judgments" are Rendered in "Suits" under Section 12.

The duties imposed upon the Court of Claims in § 12 of this act are as follows:

"When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted."

The adverse decision of the Court of Claims upon the application for appeal was based on the theory that the right of appeal granted by § 9 of the act of March 3, 1887, was limited by the words of § 707, Rev. Stat. allowing appeals "from all judgments," and that the findings of fact and conclusions of law and the transmission of these to a department are not a "judgment."

Certainly they bear a strong resemblance to a special verdict, judgment and execution, and we maintain that they constitute a judgment in the proper sense of that word. In its limited sense this word denotes a final decision of a court of common law fixing a liability to pay a certain sum of money, upon which an execution may issue, but that is not its meaning under Rev. Stat. § 707.

The judgments of the Court of Claims can not form the basis of an execution, a characteristic of a "judgment" in one sense of the word. They are simply paid on presentation of a certified copy to the Secretary of the Treasury, out of any general appropriation made by law for the payment and satisfaction of private claims (Rev. Stat. § 1089).

"In these cases there is nothing that bears the likeness of a writ of execution or contains any of its ingredients; the court issues no command; nothing runs against the property of the defendants; the Secretary of the Treasury is not an officer of the court." (*Brown* v. *United States*, 6 C. Cls. 171, 179.)

By the practice of the last ten years no appropriation is now made by Congress in advance for the payment of any such judgments, and they are all reported to Congress and there appropriated for after their rendition by the Court of Claims. And yet this court has held that, notwithstanding their liability to revision by Congress, they constitute judgments rendered in the exercise of the judicial power conferred by the Constitution, and may regularly be brought to this court by appeal. *United States* v. *Jones*, 119 U. S. 477. The moral force of a judicial determination under a constitutional Government is greater than the power of the sword. *United States* v. *Lee*, 106 U. S. 196, 223.

In England it was never doubted that the petition of right was a strictly judicial proceeding, though "the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him" (1 Black. Comm. 243), and though, when judgment is rendered for the plaintiff in such an action, "by such judgment the crown is instantly out of possession, so that there needs not the indecent interposition of his own officers to transfer the seisin from the king to the party aggrieved" (3 Black. Comm. 257).

By Rev. Stat. §§ 1059 (paragraph 3), 1062, the Court of Claims is authorized to ascertain the facts of loss of Government funds, vouchers, records, etc., by disbursing officers, and, on finding it to have been without fault or negligence, to "make a decree setting forth the amount thereof, and upon such decree the proper accounting officers of the Treasury shall allow to such officer the amount so decreed, as a credit in the settlement of his accounts." It has never been doubted that an appeal lies from a "decree" rendered under these provisions. *United States* v. *Clark*, 94 U. S. 73, 96 U. S. 37; *United States* v. *Smith*, 105 U. S. 620.

Thus the confined sense of "judgment" can not be applied to the word as used in Rev. Stat. § 707. This em-

braces judgments upon which no execution issues, judgments which Congress may refuse to honor, and decrees for the allowance of credits on the Treasury records.

If the word "judgment" is extended out of its strict common-law meaning and embraces decrees, no line can be drawn which will exclude from its meaning any other official and authentic decision of a court of justice, determining the rights of the parties, such as the "conclusion of law" and "report" of the same to the Department under § 12 of the act of 1887.

The latest law dictionary, Black, gives the following definition:

"JUDGMENT—the official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination.

"The conclusion of law upon facts found, or admitted by the parties, or upon their default in the course of the suit. Tidd, Pr. 930; 32 Md. 147.

"The decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein for the redress of an injury. 3 Bl. Comm. 395; 12 Minn. 437. (Gill. 326.)

"A judgment is the final determination of the rights of the parties in the action. Code, N. Y., § 245; Code. Civil Prac. Cal. § 577; Code, Civil Prac. Dak. 228."

Bouvier's Law Dictionary thus defines judgment:

"The decision or sentence of the law, given by a court of justice or other competent tribunal, as the result of proceedings instituted therein, for the redress of an injury."

While the procedure of the Court of Claims in cases referred under § 12 of the act of 1887, contains some peculiar features, yet the decision rendered contains all the essential attributes of a "judgment" as defined by the authorities. It is "official," "authentic," "a conclusion of

law upon the facts found," "a final determination of the rights of the parties," and "a decision given by a competent tribunal as the result of proceedings." Of all these essentials none are lacking, unless the suggestion be made that the decision lacks finality and is subject to revision by the head of the Department by which it was transmitted.

This, indeed, is the view taken by the court below. It has said in its opinion that as to the findings of fact and conclusions of law under the act of 1887 "the head of a Department may or may not act upon and be guided by the findings as he sees fit."

And again:

"The head of a Department may revise the findings of the court and may wholly disregard them if he so desires."

This position we maintain to be unsound for the following reasons:

1. The statute makes the decision final.

2. Jurisdiction can not be constitutionally conferred upon the Court of Claims to render a decision which shall be subject to executive revision.

There is no declaration in the act of March 3, 1887, that the findings and opinion of the court are not to be considered binding upon the executive officers. The distribution of Governmental powers under the Constitution plainly implies the reverse. It is an essential of judicial power that it should be supreme within its jurisdiction. The decisions of the judiciary are absolutely binding within its sphere of action.

The determination of private rights is peculiarly a judicial duty; and none the less when the controversy is between the citizen and the Government, than when be-

tween private parties on both sides. The jurisdiction of the Court of Claims as one of the inferior courts of the United States authorized by the Constitution, is derived from that clause of the Constitution which extends the judicial power of the United States "to controversies to which the United States shall be a party." Article 3, § 2. Story (Const. § 1678) refers to the defect in the laws of the United States at the time of his writing, from the failure of Congress to provide for suits against the United States, "as it is clearly within their constitutional authority to do so."

The statute under which this case went into the Court of Claims follows almost the very language of the Constitution. It provides: "That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same," etc.

The Constitution gives jurisdiction of "controversies"; the statute, of "claims which involve controverted questions." Here then we have a "controversy" to which the United States is a party, and that controversy is referred to a court of the United States to find the facts and to make conclusions of law. There is nothing in the nature of the jurisdiction thus conferred upon the judicial department that should render it permissible for the head of an Executive Department, thus seeking judicial decision, to "revise the findings of the court and wholly disregard them if he so desires."

The provisions of § 12 of the act of 1887, that the findings of fact and conclusions of law shall be transmitted to the proper department, are a mere substitute for the award of execution. The signification of the language is, that the findings and conclusions of the court shall be transmitted to the department for execution in

place of the issuance of a *fieri facias*, as would be required in general practice at common law between individuals. In other words, the case is remanded to the Executive Department, not for the purpose of revision or modification, or even as the Court of Claims suggests, for possible total reversal, but for execution only.

To hold otherwise would be subversive of all true theories of the relation between the Executive Departments and the courts of law. Decisions of the courts of the United States are to be followed by the Executive Departments, not those of the Departments by the courts. It is a constitutional axiom that each of the three Departments of the Government shall be supreme within its jurisdiction (Story, Const. §§ 518–524). It violates this axiom to say that the determination by the judiciary of the rights of parties to a forensic controversy shall be subject to executive revision.

All the analogies of previous legislation and executive practice go towards establishing the finality of such a decision.

Section 356 of the Revised Statutes provides that "The head of any Executive Department may require the opinion of the Attorney-General on any question of law arising in the administration of his Department."

It has been held that opinions of the Attorney-General are to be followed as law by the Departments, unless overruled by their common superior, the President (5 Opin. 97; 6 Opin. 326; 7 Opin. 700). If the opinions of a co-ordinate executive officer are to bind his peers, without any direct statutory mandate, so much the more should the same executive authorities be bound by the decisions of the judiciary.

Still more strongly is the controlling force of judicial decisions over the action of the Departments recognized by § 191 of the Revised Statutes of the United States.

"The balances which may from time to time be stated by the Auditor and certified to the heads of Departments by the Commissioner of Customs, or the Comptrollers of the Treasury, upon the settlement of public accounts, shall not be subject to be changed or modified by the heads of Departments, but shall be conclusive upon the Executive branch of the Government, and be subject to revision only by Congress or the proper courts."

This section distinctly recognizes the special province of the judiciary to make final decisions in matters controverted between the United States and the citizen, binding alike upon the citizen and all the Departments of the Government.

The Court of Claims itself, after reviewing a number of provisions of law, said in *Meigs* v. *United States*, 20 C. Cls. 181, 187: "The course of legislation unmistakably indicates the intention of Congress that the decisions of the Court of Claims shall be guides and precedents for the Executive Departments in all like cases. The wisdom of such legislation and of the intention of Congress indicated thereby is manifest."

This court, in *United States* v. *Anderson*, 9 Wall. 56, 72, expressed itself with no uncertainty upon a similar point. Anderson had recovered a judgment in the Court of Claims for a specific sum for the proceeds of captured property in the Treasury. The United States contended that the court below could only determine that the claimant was entitled "to receive the proceeds of his property, leaving it for an officer of the Treasury to fix the amount." The court said:

"To sustain this position, would require us to hold that for this class of cases Congress intended to constitute the Court of Claims a mere commission. This court will not attribute to Congress a purpose that would lead to such a result, in the absence of an express declaration to that effect."

In *United States* v. *Klein*, 13 Wall. 128, this court reviewed the whole subject of the organization and powers of the Court of Claims, and held that it was not competent for Congress to prescribe a rule of decision to that court in cases pending before it. If Congress could not thus directly dictate to that court a rule of decision, how much less can it authorize Executive Departments to review and revise its decisions!

The Constitution thus asserts the independence of the judiciary, the course of legislation indicates the finality of judicial decision, the analogy of executive practice confirms it, and the courts have maintained their own independence. Where the statute is silent, these considerations must prevail in settling its construction.

But we go further and maintain that the decision of the Court of Claims can not constitutionally be made subject to revision by the Executive Departments.

We rest this contention upon adjudged cases from the foundation of the Government.

The first of these is *Hayburn's Case*, 2 Dall. 409.

The act of March 23, 1792, 1 Stat. 243, provided (§ 2, page 244) that any disabled soldier of the revolution should be entitled to such pension "as the Circuit Court of the District in which they respectively reside, may think just," upon attending the court in person and producing certain proofs.

The Circuit Court was directed to transmit its decision to the Secretary of War, who was permitted, if he suspected fraud or perjury, to withhold the name from the pension roll. The Circuit Court in New York, consisting of Chief Justice Jay and Justice Cushing of the Supreme Court and District Judge Duane, rendered an opinion that the Circuit Court could not constitutionally act under this law, because their decision was made subject to the revision of the Secretary of War; but 'out of motives of

humanity the judges of the court were willing to regard themselves as commissioners, and while at liberty to accept or decline that office, they determined to proceed as commissioners and to examine claims submitted to them.

The Circuit Court for Pennsylvania, consisting of Wilson and Blair, Justices, and Peters, District Judge, declined to act at all, because the decision of the court was subject to revision by the Executive.

The Circuit Court in North Carolina, consisting of Iredell, Justice, and Sitgreaves, District Judge, declined to proceed as judges, but determined to hold their court open for the reception of applications, leaving for further consideration the question whether they might with propriety act as commissioners. The opinions of those courts were communicated to President Washington, and the Attorney-General brought a petition for mandamus in the Supreme Court, directed to the Circuit Court for the District of Pennsylvania, commanding them to proceed under the act. After argument, but before decision, the act of February 28, 1793, 1 Stat. 324, changed the procedure, so as to relieve the courts of the embarrassments expressed in these opinions.

As some of the judges had acted as commissioners, it was made the duty, by § 3 of this act (p. 325), of the Secretary of War and Attorney-General to obtain an adjudication by the Supreme Court upon the validity of rights claimed under the former act by the "determination of certain persons, styling themselves commissioners." The question was brought before the Supreme Court in the case of *United States* v. *Yale Todd*, which was not reported at the time, but appears in full in a "note by the Chief Justice inserted by order of the court," annexed to the opinion in *United States* v. *Ferreira*, 13 How. 52. An action was brought by the United States against a pensioner who had received $172.91 under an adjudication made

by Chief Justice Jay, Justice Cushing, and Judge Law, "claiming to be commissioners." The judgment was in favor of the United States, for the sum already received. Chief Justice Jay and Justice Cushing both sat in this case and acquiesced in the judgment, although it involved a reversal of their own act in sitting as commissioners.

The question next came before the Supreme Court in the case of *United States* v. *Ferreira*, 13 How. 40. The act of Congress of March 3, 1823, 3 Stat. 768, gave to the "Judges of the Supreme Court, established at St. Augustine and Pensacola in the territory of Florida" the right to determine certain claims against the United States, subject to the revision of the Secretary of the Treasury. The act of March 3, 1849, 9 Stat. 788, referred a few special claims therein designated to" the judge of the District Court of the United States for the Northern District of Florida." An appeal was prosecuted from one of his decisions to the Supreme Court of the United States and that court held (by Taney, C. J.) that the statute in question conferred the power upon the judge personally and not upon the court; that it involved no exercise of judicial power, because subject to executive revision; and that no appeal would lie from his decisions to the Supreme Court. The judge had supposed himself to be exercising judicial power under the Constitution, but the Supreme Court declared this to be erroneous. They reviewed with care the decision in *Hayburn's Case*; and the "note by the Chief Justice, inserted by the order of the Court," already mentioned, was appended, reviewing in full the case of Yale Todd. From that note we make the following quotation:

"The result of the opinions expressed by the Judges of the Supreme Court of that day in the note of *Hayburn's Case*, and in the case of the *United States* v. *Todd*, is this:

"1. That the power proposed to be conferred upon the

Circuit Courts of the United States by the act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.

"2. That as the act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

"3. That money paid under a certificate from persons not authorized by law to give it might be recovered back by the United States."

The court intimated a doubt whether the action of the District Judge in proceeding as a commissioner in *Ferreira's case* was lawful, but declined to express an opinion thereon, the question not being necessarily involved in the issue.

In *Gordon* v. *United States*, 2 Wall. 561, it was held by this court that no appeal would lie from decisions of the Court of Claims under the act of March 3, 1863, 12 Stat. 765, which provided by its 14th section (p. 768) for a review of the decision of the court by the Secretary of the Treasury. No opinion was rendered at that time, but it appears in 117 U. S. 697, that an opinion had been prepared by Chief Justice Taney just before his death. This was submitted to the judges after his death and was considered in reaching the conclusion announced. Search was made for it at the suggestion of the surviving members of the court, and it was published with their assent. That opinion asserts the following propositions:

1. Judicial power under the Constitution is not exercised where judgments are subjected to review by executive officers (pp. 702, 704).

2. The Supreme Court can exercise appellate jurisdiction only over tribunals exercising judicial power under the Constitution (p. 702).

We quote the following (p. 704):

"And it is very clear that this court has no appellate power over these tribunals, and can not, under the Constitution, take jurisdiction of any decision, upon appeal, unless it was made by an inferior court, exercising independently the judicial power granted to the United States. It is only from such judicial decision that appellate power is given to the Supreme Court."

After the repeal of the provision in the act of March 3, 1863, authorizing the review of the judgments of the Court of Claims by the Secretary of the Treasury, the Supreme Court took cognizance of appeals. This was a declaration that the Court of Claims had become a court of the United States exercising judicial powers under the Constitution, and this was expressly asserted in *United States* v. *Klein*, 13 Wall, 128, 145.

By these cases it is thus positively decided:

1. That a court of the United States, exercising judicial power under the Constitution, can not be made subject, in its judicial duties, to the supervision of executive officers. *Hayburn's Case*, 2 Dall. 409; *United States* v. *Yale Todd*, 13 How. 52.

2. That the Court of Claims is a court of the United States exercising judicial power. *United States* v. *Klein*, 13 Wall 128, 145; *United States* v. *O'Grady*, 22 Wall. 641; *United States* v. *Jones*, 119 U. S. 477.

No power is conferred upon the judges of the Court of Claims personally as Commissioners by section 12 of the act of March 3, 1887. Whether such a power would be constitutional is wholly immaterial. The powers conferred by section 12 are conferred upon "said Court of Claims." It is the same Court of Claims on which jurisdiction had been conferred by the first section of the same act.

The independence of the judiciary was the object of great concern to the founders of the Government, as evinced by the early decisions referred to. The recent decision of the Circuit Court for the Northern District of Illinois, reported only in the newspapers, holding unconstitutional a portion of the Interstate Commerce Act on the ground that (See New York *Times*, December 8th, 1892) "Congress can not thus make a judicial department the mere adjunct or instrument of the other departments of the Government" shows that the judiciary has not forgotten the importance of this independence. The highest grounds of public policy demand a like assertion here.

This court had before it in Ex parte *Zellner*, 9 Wall. 244, a case identical in principle with the present. A statute provided that certain property in the insurrectionary districts should be seized and that "any person claiming to have been the owner of any such abandoned or captured property, may at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims and, on proof to the satisfaction of the said court, of the ownership of said property, of his rights to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, receive the residue of proceeds, after deducting expenses," etc. The act contained no provision for an appeal from the judgments or decrees of the court. Indeed, it nowhere in express terms even authorized the entry of a judgment by the Court of Claims. But it had been held in *United States* v. *Anderson*, 9 Wall. 56, 72, that the power to enter a judgment was implied and that this court should not attribute to Congress a purpose "to constitute the Court of Claims a mere commission," "in the absence of an express declaration to that effect." Notwithstanding however, the absence from the act of any provision, either for the entry of a judgment by the Court of Claims or for

an appeal to this court, it was held that the power of the Court of Claims extended to the entry of a judgment, and that a preceding statute, general in terms, having given an appeal to this court, the right of appeal extended to all subsequent subjects of jurisdiction.

The present case is even stronger than the Zellner case. We need not here rely upon some preceding statute as allowing an appeal, for the very statute under which this suit was brought into the Court of Claims in express terms provides for an appeal to this court.

The policy of authorizing the Executive Departments to refer matters pending before them to the Court of Claims for adjudication is not a new one. It originated in the act of June 25, 1868, Sec. 7, 15 Stat. 76, now embodied in §§1063–65 of the Revised Statutes. Numerous cases have come before the Court of Claims by reference under these provisions.

The original section of the act of 1868 expressly gave an appeal to this court. The provision to that effect is omitted from the corresponding sections of the Revised Statutes, yet no doubt has been raised that appeals lie in all cases so referred under the general terms of § 707 of the Revised Statutes. Several have come to this court, where jurisdiction of them has been entertained without question. *United States* v. *Lippitt*, 100 U. S. 663; *United States* v. *McDougall's Administrator*, 121 U. S. 89; *Finn* v. *United States*, 123 U. S. 227; *Martha P. Stotesbury* et al. v. *The United States*, No. 30, October Term, 1892.

The power of the Department to refer under this section, however, was limited to "cases which by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant."

This confined the power of reference to claims for the payment of money out of the Treasury, that being the

only class of cases of which the Court of Claims had jurisdiction under the decision of this court in *United States* v. *Alire*, 6 Wall. 573.

Section 12 of the act of 1887 is much broader, and permits the reference of "any claim *or matter*" pending before the Department, many of which would not involve the direct payment of money from the Treasury; as in the present case, where the claimant is seeking satisfaction out of a special fund; or, as in *Billings* v. *United States*, 23 C. Cls. 166, and *Smith* v. *United States*, 23 C. Cls. 452, where the question was whether certain alleged erroneous or unlawful payments should be stopped against the pay of officers of the army. In such cases a money judgment would not ordinarily be appropriate relief.

The conclusion of law rendered is as binding as a money judgment; but the means of its execution is more properly sought in and through the Department from which it originally came.

Section 12 of the act of 1887 properly submits all such controverted questions to the Court of Claims, and section 9 provides for a final decision of them by this court. It is eminently fitting that the determination of difficult questions involving conflicting interests between the citizens and the Government should be submitted for determination to a Court of the United States; and it would be difficult to assign a just reason for denying to this court appellate power over the same class of controversies.

In conclusion, we beg leave to cite the opinion of Hon. John T. Morgan, as expressed in his elaborate speech of January 27, 1892, in the United States Senate, in support of the bill referring the alleged fraudulent awards of the late Mexican Claims Commission to the Court of Claims for review, with the right of appeal to this court. The argument being directly pertinent to the bill under consideration is entitled to all the weight of the high au-

thority of that distinguished jurist, who now occupies, with a judge of this court, a position upon a high international tribunal. He there said:

"In the enactment of our laws establishing a Court of Claims, Congress had all of this law under its immediate examination, and made the provisions of the act of March 3, 1887, in conformity to the existing decisions of the Supreme Court of the United States and well-recognized principles of constitutional and other law. Section 12 provides:

"'That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been been found, the court shall report its findings to the Department by which it was transmitted.'

"There is a case provided for where a controversy is pending before it becomes a case, a claim that is not a case and can not be made a case under any existing law, which can only become a case after we have passed a law giving a court jurisdiction and authorized the United States to sue or compel the other party to sue, or in default thereof to be debarred of his right. When a matter of that kind is depending in any of the Executive Departments of the Government, then by the consent of the parties that case can be transferred to the Court of Claims, together with all documents appertaining thereto, and the judgment that the Court of Claims is to render upon it is as follows:

"'When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted.'

"Now, under section 9—

"'That the plaintiff or the United States, in any suit brought under the provisions of this act shall have the

same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.'

"There is a controversy pending before an Executive Department referred by this statute, with the consent of the defendant, to the Court of Claims. That court finds the facts and the law, and returns its report to the Department. That report is made expressly appealable by the ninth section of the act which I have just read." (Congressional Record, 52d Congress, 1st session, part 1, pages 587 and 588.)

It is therefore submitted that the case is a proper one for the issuance of the writ of mandamus to require the allowance of an appeal by the Court of Claims.

CHARLES KING,
GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Petitioner.

11 Aug. 148 U.S. 222

IN THE

Supreme Court of the United States.

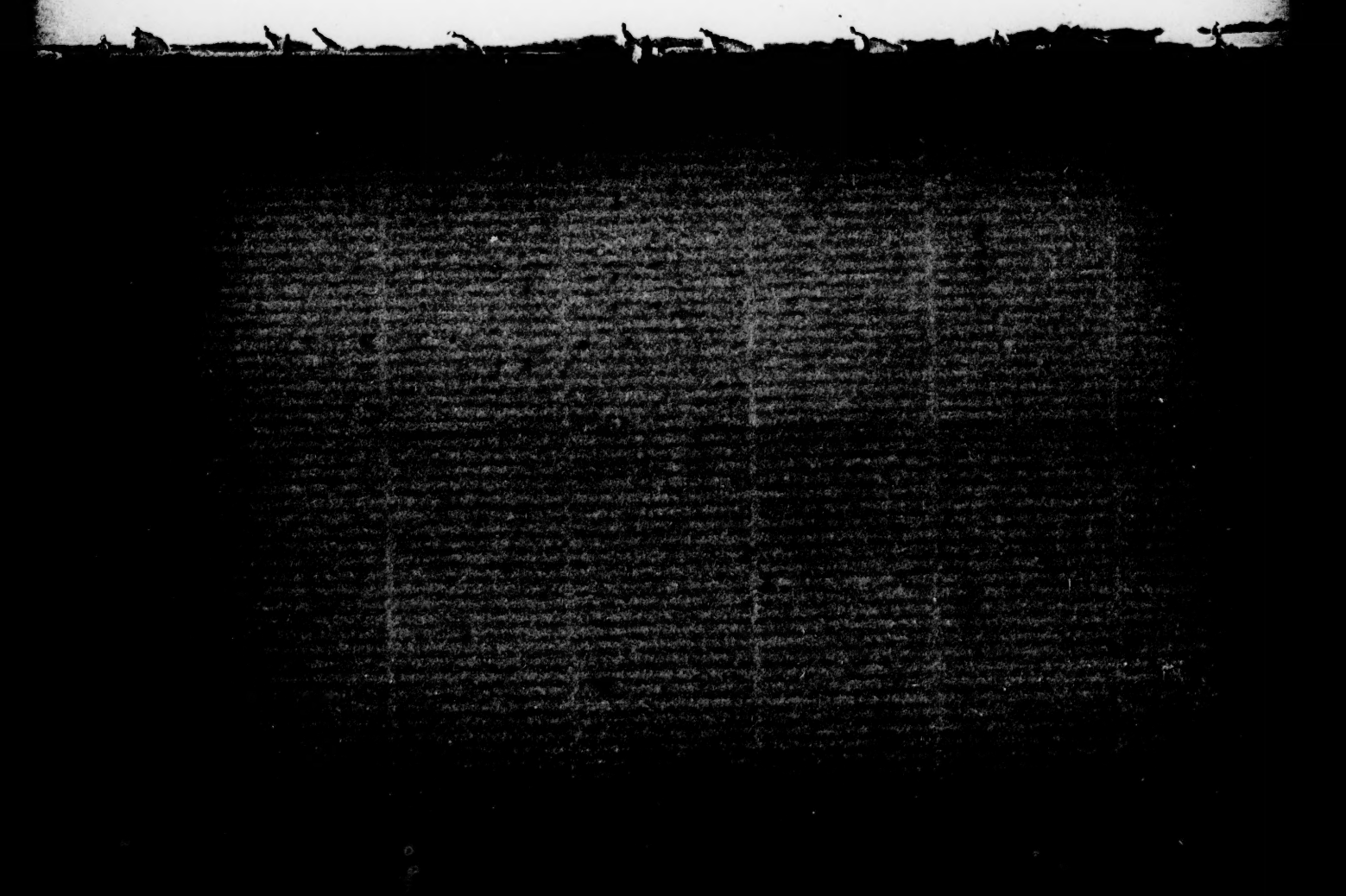
OCTOBER TERM, 1892.

In the Matter of the Petition of JOHN B. SANBORN for a Writ of Mandamus on the Judges of the Court of Claims, commanding them to allow an appeal from a certain judgment of said Court.

PETITION FOR WRIT OF MANDAMUS.

CHARLES KING,
GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Petitioner.

H. L. McQUEEN, PRINTER.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

In the matter of the petition of JOHN B. SANBORN for a writ of Mandamus on the Judges of the Court of Claims, commanding them to allow an appeal from a certain judgment of said Court.

Petition for Writ of Mandamus.

To the Honorable, the Justices of the Supreme Court of the United States:

The petition of John B. Sanborn, a citizen of the United States and of the State of Minnesota, residing at the city of St. Paul in said State, respectfully represents:

That on the 28th day of November, in the year 1891, the Secretary of the Interior transmitted to the Court of Claims, with the consent of your petitioner, a certain claim made by him to certain fees under a large number of contracts made by him with members of the Sisseton and Wahpeton bands of Sioux Indians for adjudication in accordance with the 12th section of an act entitled, "An Act to provide for the bringing of suits against the Government of the United States," approved March 3, 1887.

That your petitioner duly filed his petition under and in accordance with the rules of said Court of Claims, and that hearing was had thereon, and testimony taken, and with the result that on the 30th day of June, in the year 1892, said court entered its findings of fact and conclusions of law, and rendered judgment in accordance with said section 12 of said act of March 3, 1887, and ordered that the same be reported to the Secretary of the Interior, as required by section 12.

That said conclusions of law and judgment being unfavorable to your petitioner, and being advised by his counsel that there was error in the proceedings, conclusion of law, and judgment of said Court of Claims, and the amount involved in his said claim being greatly in excess of three thousand ($3,000) dollars, to wit, amounting to the sum of about twenty-five thousand (25,000) dollars, he did on the 7th day of July, in the year 1892, make application in due form, for the allowance of an appeal to the Supreme Court of the United States.

That said Court of Claims immediately after entering its conclusions and judgment in the case of your petitioner on said 30th day of June, in the year 1892, adjourned to the 10th day of October, 1892, and your petitioner's application for appeal was therefore in accordance with the orders made by this court, relative to such appeals, and the rules of said Court of Claims, filed in the office of the clerk of the Court of Claims and submitted to the Chief Justice of said court, at Chambers.

That said Chief Justice on the 13th day of July, in the year 1892, entered an order denying and refusing your petitioner's application, upon the sole ground that no appeal lies in cases referred by heads of Departments under section 12 of said act of 1887.

That your petitioner being dissatisfied with the action of said Chief Justice, renewed his application before the

said court in full bench, but after hearing had on said application, said court on the 7th day of November, in the year 1892, entered an order affirming and adhering to the action of said Chief Justice in the denial and refusal of the appeal.

That all said proceedings took place at the December Term, 1891, of said Court of Claims, which began on the 1st Monday of December, 1891, and expired by adjournment without day, on the 1st day of December, 1892.

That your petitioner being without further remedy in the premises, now prays your honorable court that the writ of Mandamus be issued out of this court, directed to the Chief Justice and Judges of said Court of Claims, commanding them to allow his appeal as prayed for.

That your petitioner annexes hereto a certified copy of the order of reference of his claim, of his petition, and that of certain Indians interested in the subject-matter of said reference, of the findings of fact, conclusions of law, order, and judgment entered by said court, of his application for appeal, of the order and opinion of the Chief Justice of said Court of Claims denying his application, of his subsequent application to said court in full bench, and of the order of said court affirming and adhering to the action of the Chief Justice.

JOHN B. SANBORN,
Petitioner.

CHARLES KING,
GEORGE A. KING,
WILLIAM B. KING,
Attorneys for Petitioner.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

John B. Sanborn, being duly sworn, deposes and says that he is the petitioner above named, and that the facts stated in the above petition are true, except those stated on information and belief, and as to them, he believes the same to be true. JOHN B. SANBORN.

Subscribed and sworn to before me, this 15th day of December, 1892. HENRY D. LANG,

[SEAL.] *Notary Public, Ramsey County, Minn.*

148 U 822

Office Supreme Court U. S.
FILED.
FEB 24 1893
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1892.

EX PARTE: IN THE MATTER OF JOHN B. SANBORN.

PETITION FOR A MANDAMUS TO THE JUDGES OF THE COURT OF CLAIMS.

BRIEF IN OPPOSITION TO THE APPLICATION.

WM. A. MAURY,
Assistant Attorney-General
and Counsel for Respondents.

Supreme Court of the United States

OCTOBER TERM, 1892.

EX PARTE: IN THE MATTER OF JOHN B. SANBORN.

PETITION FOR A MANDAMUS TO THE JUDGES OF THE COURT OF CLAIMS.

BRIEF IN OPPOSITION TO THE APPLICATION.

This is an application for the writ of mandamus to compel the judges of the Court of Claims to allow the petitioner, John B. Sanborn, an appeal to this court under the following circumstances:

Sanborn claimed a considerable sum of money as commissions alleged to have been earned by him under a number of contracts between him and certain Indians. The Secretary of the Interior, within whose province it fell to pass upon the claim, being in doubt as to its validity, referred the question to the Court of Claims, with the petitioner's consent, under section 12 of the act of March 3, 1887. (24 Stat., 505; 1 Supp. Rev. Stat., 2d Ed., 559.)

The court reported to the Secretary against the claim.

Sanborn then moved the Court for the allowance of an appeal to this court from the report to the Secretary, but the motion was denied, and hence the present endeavor to obtain an appeal under the compulsion of a mandamus.

ARGUMENT.

It was our first intention to submit this case, on the side of the respondents, upon the opinion of the learned Chief Justice of the Court of Claims in support of the denial of the appeal (Exhibit, pp. 59–64), but, at his suggestion, a somewhat more extended discussion of the questions involved is now offered.

Section 12 of the act of March 3, 1887, under which the petitioner's claim was referred to the Court of Claims, is as follows:

> That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found the court shall report its findings to the Department by which it was transmitted.

And the right of appeal contended for in this application is supposed to be authorized by section 9 of the said act, which is as follows:

> That the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and, as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

Acting on the well-known principle that the best way to interpret a statute is to read each of its provisions in the light of all the others, we shall begin by looking at the act of March 3, 1887, as an entirety, and not follow the example of the learned counsel on the other side, who seem to have been misled by confining their attention to the two sections of the act which are quoted above.

The statute may be conveniently divided into two parts for the purpose of interpretation. The first part, embracing sections 1 to 11, inclusive, relates to a material enlargement of the scope of the right to sue the United States and to granting, under limitations as to the amount in controversy, to the circuit and district courts of the United States, jurisdiction over suits against the United States, concurrent with that of the Court of Claims. The second part, embracing sections 12 to 14, inclusive, gives (section 12) the head of any Executive Department the right to transmit to the Court of Claims, *with the claimant's consent*, any "*claim or matter*" involving controverted questions of fact or law, together with the vouchers, etc., pertaining thereto, to be "proceeded in under such rules as the court may adopt," and the court shall report its findings, in law and fact, to the Department that transmitted the particular "claim or matter." This right is similar to the one Congress had been exercising, for several years, under the act of March 3, 1883, known as the Bowman Act.

Section 13 provides, that in any case referred to the Court of Claims under the Bowman Act, which might have been originally brought in that court, it shall render

a "judgment or decree" in such case, "*and report its proceedings therein to either House of Congress, or to the Department by which the same was referred to said court.*"

Section 14 provides that any bill for a claim, legal or equitable, except for a pension or for "a grant, gift, or bounty to any person," may be referred by the House in which it is pending to the Court of Claims, to be there proceeded in as prescribed by the Bowman Act; and the court is to report to such House "*the facts in the case* and the amount," "where the same can be liquidated," and "*any facts*" bearing on the question of laches in the claimant, and on the question whether the bar of any statute of limitations should be removed, "or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy."

The concluding sections, 15 and 16, may be laid out of view entirely, as they merely provide for costs against the Government in certain cases and the repeal of all laws and parts of laws inconsistent with the act.

It is thus apparent that the first part of the act, embracing sections 1 to 11, inclusive, contemplates the exercise of judicial power by the courts therein mentioned, and that the second part relates to the exercise of *advisory, nonjudicial power*, with the exception, perhaps, of section 13, which, however, is scarcely of any practical moment, as it must rarely happen that a claimant will go to Congress for relief when he might have sued in the Court of Claims.

When, therefore, it is considered that section 9, under which the right of appeal is claimed here, occurs in that

part of the statute which relates to the exercise of judicial power only, it would seem more than probable, from the position of the section, that it was the purpose of Congress to confine appeals to cases involving a clear exercise of judicial power, manifested, in the usual manner, by the entry of a judgment or decree.

In this way, section 9 can have full operation without attributing to Congress the intention to give a writ of error or an appeal in any case where a judgment or decree is not required to be entered.

Section 9 gives no appeal to the Court of Claims, except where a judgment has been entered; section 3 authorizes an appeal to this court from any "judgment" rendered by the Court of Claims in the class of cases provided for in that section; sections 5, 6, and 10 expressly provide for judgments or decrees in suits brought under section 2, and section 1, defining the cases which the Court of Claims "shall have jurisdiction to hear and *determine*," beyond question contemplates that the determination thus authorized shall be manifested by a judgment or decree. And, as we have seen, section 13 declares that the final action of the Court of Claims, therein provided for, shall be in the form of a "*judgment or decree*."

Now, knowing, as Congress did, that the preëxisting law (section 707, R. S.), adopted by section 9, only authorized appeals from "*judgments*" of the Court of Claims, it would have been a remarkable oversight, if Congress had intended appeals to lie under section 12, not to provide specially for them, as was done in sections 3 and 10.

It would seem clear, from his petition filed in the Court of Claims, that the petitioner not only did not regard the action of the Court of Claims, in this case, as a technical judgment under section 12, but that he did not consider it as having even the element of finality. He expressly says, in the petition, that the Secretary of the Interior has retained the amount covered by the claim "to abide the FINDINGS of the court herein and HIS JUDGMENT THEREON" (Exhibit, p. 11). From which it is manifest that the claim to the right of appeal, now set up, is a mere afterthought.

If the words "*any suit*," as used in section 9, giving the right of appeal, are to have the sweeping meaning contended for by the learned counsel for the petitioner, it would seem to follow that the class of cases provided for in section 12 are subject to the provision of the second clause of section 1, "That no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

But as there is no limitation of time as to the right to present a claim to an Executive Department, it would seem extremely unreasonable to conclude that Congress intended to allow claims to continue to be presented without regard to time, as heretofore, and at the same moment intended to deny to the heads of Departments the right to call on the Court of Claims for assistance in cases which had not been presented to such Departments within six years after the claimants' rights had accrued.

But it would seem that the first section of the act is, also,

conclusive on the point that the claims and matters referred to in section 12 are not such as Congress intended to subject to the judicial power of the Court of Claims. The only matters which the court has "*jurisdiction to hear and determine*" are set forth in section 1, as follows:

> First. All claims founded upon the Constitution of the United States, or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same.
>
> Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Prorided*, That no suit against the Government of the United States shall be allowed under this act, unless the same shall have been brought within six years after the right accrued for which the claim is made.

We look in vain through this enumeration of subjects over which Congress has extended the judicial power of the Court of Claims for the class of cases covered by section 12, and the inference is, therefore, inevitable, that Congress did not intend that that court should "*determine*" any "claim or matter" referred to it under that section, and the same may be said of section 14.

But there is still another reason for saying that a "*claim or matter*" referred by the head of a Department to the Court of Claims under section 12 was not intended to be finally determined by the court.

It will be remembered that section 1063 (Revised

Statutes) had already provided for references by the heads of Departments to the Court of Claims of cases pending before the Departments and relating to subjects within the jurisdiction of the court, and for the final disposition of such cases by the court.

But this law fell short of meeting the whole evil, which grew out of the inability of the Executive Departments to deal with questions *administrative and executive in character* to which the judicial power could not be extended, yet requiring judicial methods for their proper investigation and determination.

It was for this class of cases that Congress intended to provide by section 12, which has given the Court of Claims an auxiliary jurisdiction, for the assistance of the Executive Departments, analogous to that established by the Bowman act, but without the seeming requirement of the latter that the Department seeking the assistance of the court should be concluded by its action. And it was for the reason that the head of a Department was to be free to adopt or reject the action of the court under section 12 that this section required the claimant's consent before he could be subjected to the delay and expense which a reference of his "claim or matter" to the court might entail.

To adopt the view contended for in support of this application would, however, defeat the purpose of Congress to provide by section 12 for the reference of a purely executive "matter" to the court by the head of a Department without being subjected to the possible embarrassment of being bound by its action. Indeed, under the

view of the other side, section 12 accomplishes no more than the Bowman act did, and was, therefore, mere supererogation.

Nothing but the most explicit language would warrant us in attributing to Congress the perilous experiment of ignoring the fundamental distribution of the powers of government in the Constitution by allowing a purely executive "matter" to be turned over to the Court of Claims for *final disposition*. The danger of outside interference with executive functions has been often adverted to by this Court. In Decatur *v.* Paulding (14 Pet., 497), where the writ of mandamus was denied on the ground that it would involve such interference, the Chief Justice, in delivering the opinion of the Court, said:

> The interference of the courts with the performance of the ordinary duties of the Executive Departments of the Government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them. Upon the very subject before us, the interposition of the courts might throw the pension fund and the whole subject of pensions into the greatest confusion and disorder. It is understood from the Secretary's return to the mandamus that in allowing the half pay it has always been calculated by the pay proper and that the rations or emoluments to which the officer was entitled have never been brought into the calculation. Suppose the court had deemed the act required by the resolution in question a fit subject for a mandamus, and, in expounding it, had determined that the rations and emoluments of the officer were to be considered in calculating the half pay: we can readily imagine the confusion and disorder into which such a decision would throw the whole subject of pensions and half pay, which now forms so large a portion of the annual expenditure of the Government and is distributed among such a multitude of individuals (p. 516).

In the Sinking-Fund cases (99 U. S., 700, 718) the Chief Justice, as the organ of the court, said: "One branch of the Government can not encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

It has been the uniform practice of Congress to use the term "judgment" or "decree" for the purpose of indicating judicial determination, whether interlocutory or final, and, in the absence of language too explicit to admit of doubt, no court would be disposed to hold that Congress meant judgment or decree in a statute which did not contain these terms.

In United States *v.* Chase (135 U. S., 255, 259, 260) one of the grounds on which this court refused to hold that Congress meant to include *letter* under the term "*writing*," in one of the provisions of the postal laws, was that whenever Congress meant *letter* in preëxisting legislation it had used that term and no other. The following, from the opinion of the late lamented Mr. Justice Lamar, is applicable to this case:

> We do not think it a reasonable construction of the statute to say that the vast mass of postal matter known as "letters" was intended by Congress to be expressed in a term so general and vague as the word "writing," when it would have been just as easy, and also in strict accordance with all its other postal laws and regulations, to say "letters" when letters were meant; and the very fact that the word "letters" is not specially mentioned among the enumerated articles in this clause is itself conclusive that Congress intended to exclude private letters from its operations.
>
> Upon this point, Judge Hammond, in his opinion in *United States* v. *Huggett* (40 Fed. Rep., 636, 641), makes the following apt and, to our minds, conclusive remarks: "I have taken the trouble to examine with care the legislation concerning our postal affairs, and do not find a single instance where Congress has ever used any other word to include 'letters' than that word itself, except such expressions as 'the mail,' 'mail-matter,' 'bag or mail of letters,' etc. * * * Whenever the legislation in hand requires specific classification or enumeration, I find no word substituted for 'letters' to express that which is commonly known as letters in relation to the postal service. We have 'letter and newspaper envelopes,' 'letter correspondence,' 'registered letters,' 'unclaimed letters,' 'dead letters,' 'request letters,' 'non-delivered letters,' 'all letters and other mail matter,' 'foreign letters,' 'letters or packets,' 'letters and packets,' 'letter postage,' 'letter mail,' 'letter and other mail matter,' and such like, almost innumerably; and these I have taken quite at

> random from the Revised Statutes. Can it be possible that Congress, then, wishing to include 'letters' in any particular and accurate enumeration, shall drop that word, so imbedded in our postal laws and that of our ancestors beyond the sea, and adopt some unfamiliar, inferior, and in every sense ambiguous term to express the idea?"

In *United States* v. *Jones* (131 U. S., 1), this court held that jurisdiction to entertain suits against the United States "upon any contract, expressed or implied, with the Government of the United States," did not embrace suits for the specific performance of contracts for the sale of land. One of the controlling considerations that influenced the court was the improbability that Congress meditated, by the broad language employed, so radical a change of policy as the transfer of the administration of the public lands from the political department of the Government, where it appropriately belonged, to the courts.

The same course of reasoning, precisely, was adopted in the important case of *Murdock* v. *Memphis* (20 Wall., 590).

There can be no doubt of the wisdom of the court in pursuing that conservative course for the protection of the public interests against legislative inadvertence. The vindication of that course seems to be found in the fact that Congress has acquiesced in the decisions in *United States* v. *Jones* (*supra*) and *Murdock* v. *Memphis* (*supra*). The decision in *United States* v. *Chase* (*supra*) Congress had anticipated by an amendment of the provision of law on which that case turned.

Should it be argued that there is significance in the fact that the provision of section 2 of the Bowman act that "*the court shall not enter judgment*" on any claim or matter re-

ferred to it by the head of an Executive Department is omitted in section 12 of the act now under consideration, the answer is that the omitted provision was made necessary in the Bowman act by another provision in the same act that the court "shall report its findings and opinions to the Department by which it was transmitted *for its guidance and action*," which Congress feared might be construed to imply the power to enter a judgment. But, this provision being omitted in section 12, the other provision, prohibiting the entry of judgment, would have been out of place and meaningless in that section. Its omission, therefore, would seem to be absolutely without significance in this discussion.

It is not surprising, therefore, to find that Mr. Tucker (after whom the act is called) and the other members of the committee of conference on the part of the House state, in their report to the House explaining some of the features of the statute in its present form, that section 12 "*takes away the power of the Court of Claims to render judgment in cases to be referred to that court by one of the Departments, and gives it power only to send its findings of the facts and its conclusions of law to the Department.*" This statement is entitled to be considered as almost authoritative. (Cong. Rec., Vol. 18, pt. 3, p. 2677, 49th Cong., 2d sess.)

The requirement of section 12 that the Court of Claims "shall *report its findings* to the Department by which it was transmitted" plainly shows that the function of the court, under this section, is purely *advisory*, and in no way binding on such Department; otherwise, it is to be presumed that the requirement would have been omitted,

as it was in section 1063 (Revised Statutes), which provides that a matter referred by a Department, under that section, shall be finally disposed of by the court by "*trial and adjudication.*"

But it is argued that this requirement of the statute is "*a mere substitute for the award of execution,*" that is to say that the transmission of the "findings" of the court in a given case to the head of the Department from which it came was intended by Congress to put such officer under a constraining sense of obligation to obey the action of the court which he would not have been under otherwise. If this is so, it is to be regretted that an explanation was not given for the omission of a similar requirement in section 1063 (R. S.), which, we have seen, does provide, in clear terms, for the final adjudication of cases transmitted by the Departments.

That no better reason can be invented for the presence of this requirement in section 12, is a very convincing argument to show that Congress did not intend that the "findings" of the Court of Claims should be binding on the heads of Departments in cases transmitted under that section.

It is said, however, that the statute (§ 9) gives the right of appeal in "any suit brought under the provisions of this act," whether there is a judgment in such suit or not, and that, consequently, an appeal lies from the action of the Court of Claims under section 12.

But we deny that the "*claim or matter*" authorized to be referred to the Court of Claims under that section is a "suit" in the sense of section 9, because this section only

gives an appeal "upon the conditions and limitations" of section 707 (R. S.), one of which is, that the appeal therein provided for shall be "from all *judgments* of the Court of Claims," and there is no provision in section 12 for the entry of judgment or final judicial action of any sort whatever.

The question here is not what Congress *might* have done or what it has actually done in *other* statutes, but what it has done by this particular act of 1887.

If the proceeding contemplated by section 12 is a "*suit*," then it would seem that so, also, is the proceeding contemplated by section 14. But will it be contended that an appeal lies from the action of the Court of Claims under the latter section? If not, by what recognized canon of interpretation shall we so limit the meaning of the word "suit" as to exclude section 14 from its operation, after having once departed from its usual signification as a proceeding for the purpose of obtaining relief by the judgment or decree of a court of justice?

We take leave to say that it is hardly probable that this court will, upon the doubtful premises of the argument on the other side, conclude that Congress intended so radical a departure from previous legislation on the subject of the appellate jurisdiction of this court as to bring section 12 within the operation of section 9. It is rather to be presumed that this court will take the conservative position it did in McLish *v.* Roff (141 U. S., p. 661), where it held that the grant of appellate jurisdiction to this court by section 5 of the court of appeals act "in any case in which the jurisdiction of the court is in

issue" extended to *final* judgments only, and hence this court, in the case cited, refused to entertain a writ of error to an interlocutory judgment overruling a demurrer. In that case the ground for the argument in support of the claim of appellate jurisdiction was stronger than it is here, but this court thought that if Congress had intended to abandon its long continued policy of confining appeals and wrts of error to final decrees and judgments, it would have used more explicit language.

It is admitted on the other side that, if the head of a Department has the right to disregard the findings of the Court of Claims in a matter referred to it by him under section 12, this court can not entertain an appeal from the action of the Court of Claims. But it is argued, with much elaboration and apparent confidence, that Congress could not have intended that the action of the court under section 12 should not be final, because it was beyond the competency of Congress to make the Court of Claims the depositary of any power not judicial in its nature, and that it is repugnant to judicial power to be subject to executive control, as was held in *Gordon* v. *United States* (2 Wall., 561; S. C. 117 U. S., 697).

The argument, indeed, amounts to this, that if judicial power is not conferred by section 12, then the section is *void*, and, as a consequence, all the legislation under which the Court of Claims has been required to act somewhat as a commission to take testimony or as a master in chancery for Congress and the Departments, including the Bowman Act, has been in violation of the Constitution of the United States, a somewhat startling propositon, it must be confessed.

To evade this result of the argument, apparently, it is said that the power given by section 12 was given to the Court of Claims as a court, and as the same court which is invested with undoubted judicial power in other parts of the act; but this position begs the very question on which the whole case turns, which question we now propose to consider, very briefly.

It is too late now to question the power of Congress to refer cases or authorize them to be referred to the Court of Claims to be dealt with outside of the judicial power. In such instances the court is named merely as a way of designating its members as the particular officers or persons who are called on to assist Congress or one of its branches, or, it may be, some committee of either House.

The action of Congress in this respect has been so often taken, that, as the Chief Justice seems to intimate, in the *United States* v. *Ferreira* (13 How., 52), it is too late now to question the power to take it.

In *United States* v. *Anderson* (9 Wall. 56, 72), this court refused to hold that Congress intended to make the Court of Claims "a mere commission" for cases arising under the captured and abandoned property act, "*in the absence of an express declaration to that effect.*" This case was decided in 1869, and, consequently, after the Court of Claims was made the depository of part of the judicial power under the Constitution, by the act of March 17, 1866. (14 Stat., 9.)

The Supreme Court does not intimate, in the case cited, that it would have been beyond the competency of Con-

gress to make the Court of Claims a commission to investigate and report upon claims under the captured and abandoned property acts. As in that case, so in all cases of legislation with reference to the jurisdiction of the Court of Claims, the question is whether Congress intended the court to act under the judicial power or not.

It is, furthermore, almost admitted by the court in the case of *United States* v. *Ferreira (supra)* that the court or judge, the character of whose action was there in question, validly performed a nonjudicial function, and *Hayburn's Case* (. Dall., 409) is cited in support of that view.

It is unnecessary to inquire whether nonjudicial functions can be *forced* upon the Court of Claims, as the judges of that court raised no objection whatever to investigating and reporting upon Mr. Sanborn's claim.

It is respectfully submitted, therefore, that this application for a mandamus seems destitute of merit and should be denied.

WM. A. MAURY,
Assistant Attorney-General.

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In the Supreme Court of the United States.

WILLIAM H. GAINES, ALBERT B. GAINES, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARIA GAINES, DECEASED, WILLIAM H. GAINES, JR., FANNIE G. WILLIAMSON, LOUISA BLASDELL, AUGUSTA STITT, MARY P. GAINES AND ALBERT B. GAINES, *Petitioners*,

v.

HENRY C. CALDWELL AND D. C. RUGG.

SAME,

v.

HENRY C. CALDWELL, AS JUDGE AS AFORESAID, AND GEORGE G. LATTA.

PETITIONS FOR MANDAMUS.

U. M. ROSE,
G. B. ROSE, } For Petitioners.

ARKANSAS DEMOCRAT CO., LITTLE ROCK.

Brief for Petitioners

In the Supreme Court of the United States.

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HENRY C. CALDWELL, AS JUDGE AS AFORESAID, AND GEORGE G. LATTA.

PETITIONS FOR MANDAMUS.

These two cases involve the same points, and will both be presented in this brief.

On the 23rd day of May, 1884, William H. Gaines and Maria, his wife, filed their bill in chancery in the court below against one Caver and defendant Latta, alleging that the plaintiffs were equitably the owners of lot 8 in block 130 in the city of Hot Springs, Arkansas, but that Caver held the legal title thereto, praying that said legal title be divested out of him, and be vested in the plaintiffs, and for an account for rents.

Defendants answered, replication was entered, the cause was set down for hearing, and much testimony was taken.

On the 8th day of November, 1887, the cause came on for hearing, and the court rendered a decree divesting title to an undivided half of said lot out of Latta, and vesting it in plaintiffs; and a reference was had to a master to state an account as to the rents. (*Tr.*, *13*.)

The report of the master having come in the court on the 21st day of April, 1888, rendered a money decree for rents in favor of the plaintiffs, and a decree for possession. (*Tr.*, *20*.)

Latta appealed to this court. Mrs. Gaines having died pending the appeal, the cause was revived in the names of her executor, legatees and devisees. The cause was decided here on the 2nd day of May, 1892, and is reported under the title *Goode v. Gaines*, *145 U. S.*, *141*.

This court held that there was no error in the decree of the court below as to the lands; but that owing to the delay of the plaintiffs in bringing suit they should not recover rents accruing prior to the beginning of the suit; and that the court erred in allowing rents that had accrued before that time. The cause was therefore reversed, each party being decreed to pay one-half of the costs of the appeal. The judgment of the court was as follows:

"And whereas, in the present term of October in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel; on consideration whereof, it is now here ordered,

adjudged and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, each party to pay one-half of the costs in this court.

"And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had herein in conformity with the opinion of this court."

Upon this a mandate was issued, concluding with the well-known form:

"You therefore are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding."

This mandate having been filed in the court below the plaintiffs, who are the petitioners here, filed their prayer for a decree vesting the title to the lands in them, and referring the cause to the master to retake and state the account according to the directions contained in the opinion of this court.

Plaintiffs also filed a petition for a writ of possession.

Thereupon the defendant filed his exceptions to said proposed decree on the following grounds:

1. That said proposed decree did not reverse the former decree.

2. That it appeared by the proofs in the cause that just after the award, and many times afterwards, appellees declared themselves satisfied with the awards made by said commission, and that by various acts and declarations they

had estopped themselves from setting up any title or right to said lot as against said Rugg.

3. That said lot includes a piece of land not embraced in the lease made by Gaines to Waldron.

4. That there were four heirs of Ludovicus Belding, under whom appellees claim, of whom said Maria Gaines was one, and that there is no proof in the record that the appellees ever acquired the title of two of said heirs, by name Henry and Albert Belding.

5. That on the former hearing in the Circuit Court, the court was of the opinion that one holding under a quitclaim deed could not be held to be an innocent purchaser for value; but that since that time the Supreme Court of the United States has held otherwise; and that there is no proof in the record to show that Rugg had such notice as would bind him.

6. That in the absence of proof of the identity of lot 14, block 77, no final decree should be rendered.

7. That there is no proof in the record that the lot described in the lease is identical with lot 14.

8. Because there is no proof in the record that appellees ever acquired the interest of Albert and Henry Belding in said lot.

9. Because there is no proof in the record that Rugg bought with notice of plaintiffs' claim; and because there is proof that he bought without such notice, and when plaintiffs were publicly proclaiming that they were content with the awards made.

10. Because there is no proof in the record on which a decree for plaintiffs can be based.

11. The appellant prays for a decree for one-half of the costs of the transcript on the appeal to the Supreme Court.

12. No judgment or decree should be rendered in favor of appellees for costs until this cause is finally disposed of.

Said petitions and exceptions were submitted to said court, when the court entered an order on record declaring that the court was of opinion that the said exceptions were well taken, and that the defendant herein should be allowed, if he so elected, to take further testimony in support of his said exceptions by way of defense to the title to the land in controversy, and that this cause should be set down upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands. Wherefore the court ordered that said exceptions be sustained, and that said decree as aforesaid be not entered; but that as the plaintiffs announced their purpose to apply to the Supreme Court of the United States for a writ of mandamus to compel the entry of said decree, and the court being willing to expedite the said proceedings, it was ordered that said proposed decree and the petition of the plaintiffs for the entry thereof be made a part of the record in said cause, and that the petition for writ of possession aforesaid be overruled.

Whereupon your petitioners excepted to said several rulings, and asked that their exceptions be noted of record, which was accordingly done.

Said proceedings as to said mandate were had before Hon. Henry C. Caldwell as sole judge presiding in said Circuit Court.

The prayer of the petition is as follows:

"Now, wherefore, as it manifestly appears that the said

court has committed an error in not obeying the mandate of this court made as aforesaid, your petitioners now pray that a writ of mandamus may issue, to the said Henry C. Caldwell, as judge of the United States Circuit Court for the Western Division of the Eastern District of Arkansas, commanding him to enter the said decree as prayed for by your petitioners, and to cause a writ of possession to issue as prayed by them, or to take such other steps as may be necessary for the proper enforcement of the decree of this court, and for all other proper relief; and your petitioners will ever pray."

The Latta case is similar in all respects, unless there may be some slight difference in the defences sought to be interposed. There is no difference in principle that we have heard of, or that we can detect.

BRIEF FOR PETITIONERS.

As to the duty of an inferior court on the receipt of a mandate showing the reversal of one of its judgments, we have not seen the law more clearly stated anywhere than by C. J. Watkins in *Nelson v. Hubbard, 13 Ark., 256.* He said:

"When a judgment is reversed for error in the proceedings of the court below, and remanded to be proceeded in according to law, and not inconsistent with the opinion of this court, it is always understood that the proceedings in the court below, prior to the fault or error which is ascertained by this court to exist, are in nowise reversed or va-

cated by the adjudication of the appellate court; but the error or fault adjudicated is the point from which the cause is to progress anew. In a criminal case,—and so in a civil case,—if the sentence or judgment of the court is inconsistent with, or not warranted by, the verdict, the cause is remanded only for the purpose of having the proper sentence or judgment entered. Where a defendant who has suffered judgment to go by default may appear to the inquiry of damages, if upon error the judgment is reversed because of any fault or error in the assessment, that is the proceeding corrected and required to be had anew in the court below. If the reversal is for insufficient notice to the defendant of the pendency of the suit, that being the first error, he will stand in the court below upon the remanding of the cause as if duly served with process.''

It would seem to be obvious that so much of the decree of the court below rendered in 1884 as was not dissented from by this court in its decree on the appeal still stands. It is a universal principle in law, physics and everything else, that whatever is established by proper authority must continue until destroyed or impaired by some force either internal or external. In the case of a statute a new statute repeals an old one by implication just so far as there may be an inconsistency between them, and no further. So a codicil to a will only revokes so much of the will as may be inconsistent with its provisions. And so of contracts, titles and everything else. If there is anything to impair the final decree rendered in 1887 by the Circuit Court, it is to be sought for alone in the decree, mandate and opinion of this court.

About these there is not the semblance of ambiguity. This court examined the various questions raised as to the title to the land, and held that no objection made to the decree below as to the title could be sustained. Passing on to the account of the rents, a matter of minor and subordinate importance, the court found an error in the rules upon which the account was directed to be taken, and the decree below was reversed, for the purpose of taking an account according to the principles laid down by this court.

To say under these circumstances that the action of this court had the effect to annul the title to the land as adjudicated by the decree below, which this court had expressly found to be unobjectionable in point of law, is to state a proposition which can only properly be characterized as surprising.

We may assume that if the decree as to the title to the land has not been invalidated by the action of this court on the appeal, it will follow that the court below had no authority to set aside that decree five years after it was rendered. We may take it as something elementary, for which no citation will be needed, that after the lapse of the term at which the decree was rendered in 1887, the decree passed beyond the control of the court, unless upon a bill of review duly filed. The time allowed for the filing of such a bill had elapsed three years and more before the court below passed on this question, and decided that that decree had been practically expunged from the record, so that the whole cause had to be tried over precisely as if it had never been tried at all.

It might also be taken as true that the court below could only act in obedience to the mandate, which at this time affords the only warrant for its jurisdiction.

In the case of *Chaires v. U. S., 3 How., 619*, this court had affirmed a decree, and had sent it back for further proceedings. On receipt of the mandate by the court below one of the parties filed a petitition for a rehearing, asking that the decree be reformed. This court said:

"This the superior court of Florida had no power to do on the facts set forth by the petition, because the decree of this court, made in affirmance of that made below, is conclusive on the inferior court, and it has no authority to disturb it by the mode proposed, but can only execute our mandate *and settle so much as remains to be done.*"

What remains to be done in this case, according to the decision of this court, which has also passed beyond its control, is the taking of the account in the manner indicated. If there had been anything else to do, this court would have said so; and if the court had meant to set aside the decree below in all respects, it would have given its reasons for so doing. The mention of one thing is the exclusion of another; and if there had been nothing more in the opinion of this court than that part of it that relates to the taking of the account, it would still be plain. But that is not all, for the court here expressly overruled every objection to the title that was brought forward by the pleadings or in the argument. To say, then, that the decree here virtually reverses the whole decree below is to say that this court has done that which, according to its own account, it had no reason

for doing, and has done something which it has said ought not to be done; or else it is to assert that this court is incapable of reversing a part of a decree and leaving the rest of the decree unimpaired; which notoriously is not true.

But we have heard it said that this court, if it meant to affirm any part of the decree below, should have said so, or should have said that the decree below should be modified so and so.

This is only a criticism, and not a very happy one, on the practice in this court in this respect, which has never been thought to be misleading. The court below has no right to dictate the language that shall be used by this court, which possesses the usual discretion of expressing its views in its own way.

According to the theory of the court below, we have reached on this subject an era of technicality heretofore quite unknown. The Statute of Uses, passed in the reign of Henry VIII., used the words "use, trust or confidence;" yet it was held that any words of equivalent import would answer the purpose of the law just as well. Here there is no doubt about the opinion of this court. But because certain sacramental words were not used, it is to have an effect entirely opposite to that which is plainly expressed. This court has said that, so far as the land was concerned, the decree below was correct, and whatever is not reversed is affirmed; yet the court below propose to set aside the decree as to the land. What more could that court do, if this court had said that that part of the decree was not correct?

Surely such a ruling as that made on the mandate in

this case is of such a character as to awaken a new sense of the uncertainty of the law.

To establish the proposition that when in an appellate proceeding this court decides that a decree is in the main correct, this is a decision affirming that part of the decree thus expressly approved, no authorities need be cited, any more than to prove that white is white and black is black; but if authorities were insisted upon, they might easily be procured.

In *Skillern v. May, 6 Cranch, 267*, after the cause had been reversed in this court, the court below thought of dismissing the case because it did not appear that it had ever had jurisdiction; but this court held that the court below could only carry the mandate into execution.

All the points that are made in the exceptions to the proposed decree in this case were either made by the defendant at the former hearing, or were abandoned.

In *Washington Bridge Company v. Stewart, 3 How., 413*, this court had reversed the case for the purpose of taking an account, as in this case. On the second appeal, the appellant's counsel sought to re-examine the original decree on its merits on the ground, which was obvious, that this court had no jurisdiction of the first appeal, seeing that at the time that it was taken, no final decree had been rendered by the court below. This was denied, the court saying that as the exception to the jurisdiction had not been made, pending the former appeal, it could not be made at any later period. The court said:

"To permit afterwards, upon an appeal from proceed-

ings upon its mandate, a suggestion of the want of jurisdiction in this court upon the first appeal, as a sufficient cause for examining the judgment then given, would certainly be a novelty in the practice of a court of equity. * * * * Shall the appellant be allowed to do more now than would be permitted on a bill of review, if this court had the power to grant him such a remedy? If he was, we should then have a mode for the review of the decrees of this court which have become matters of record, which could not be allowed as an assignment of error for a bill of review in any of those courts of the United States in which that proceeding is the ordinary and appropriate remedy."

The court said that the leave asked would be "equivalent, had it been allowed, to a decision that the judgment of this court might be reviewed, when the law points out no mode in which that can be done, either by this court or any other court. The want of power in this court to review its judgments or decrees has been so frequently determined by it that it is not now an open question."

What are the so–called "exceptions" to the decree filed in the court below but a bill of review of the decree of the court below as to the title of the land, and of the decree of this court finding that there was no error therein? Names go for nothing.

"A bill of review is in the nature of a writ of error, and its object is to procure an examination and alteration, or reversal of a decree made upon a former bill, which decree has been signed and enrolled."

Sto. Eq. Pl., sec. 403.

Apart from the lapse of time after decree rendered in this court, no bill of review could, in any case, be filed without the consent of this court first obtained.

Southard v. Russell, 16 How., 570.

Kimberly v. Arms, 40 Fed. R., 553.

In *Purcell v. Miller, 4 Wall., 519*, the plaintiff after decree against him sought to file a bill of review on the ground, among others, that since the hearing his disability to testify in his own behalf had been removed by act of Congress, which would enable him to prove the contract relied on. This was denied, the court citing Bacon's rules, which declared that "No bill of review shall be admitted except it contain either error in law appearing in the body of the decree without further examination of the matters in fact, or some new matter which hath arisen in time after the decree; and not on any new proof which might have been used when the decree was made."

In *Martin v. Hunter, 1 Wheat., 355*, the court said:

"A final judgment of this court is supposed to be conclusive on the rights which it decides, and no statute has provided any process by which the court can revise its own judgments. In several cases which have been formerly adjudged in this court, the same point was argued by counsel, and expressly overruled. It was solemnly held that a final judgment of this court was conclusive on the parties, and could not be re-examined."

In *Exparte Dubuque and Pacific R. Co., 1 Wall., 69*, there was judgment in ejectment, and error to this court, where the judgment below was reversed, with directions to

the lower court to enter judgment for the defendant. After mandate issued and filed, the plaintiff filed affidavits showing new facts. There was also a local statute giving either party in ejectment the right to a second trial in all actions of ejectment. The court below granted a new trial, and was compelled by mandamus issued from this court to erase the order, the court saying:

"The twenty-fourth section of the judiciary act of 1789 governs the practice in cases brought up and reviewed in this court. *It is bound to give such judgment as the court below ought to have given*, and the law directs that a mandate shall be sent down to have the judgment entered as final in the lower courts, when it is for the defendant below as here. The District Court has no power to set aside the judgment of the Supreme Court, its authority extending only to executing the mandate."

In *Story Exparte, 12 Pet., 339*, after the cause had been sent back from this court, the defendant asked that the suit be dismissed because it had abated by the death of the plaintiff before the hearing in this court. It was held that the court below could not depart from the terms of the mandate.

In *Noonan v. Bradley 12 Wall., 129*, the court in a similar case said:

"Rehearings are never granted where a final decree has been entered and the mandate sent down, unless the application is made at the same term, except in cases of fraud. Appellate power is exercised over the proceedings of subordinate courts, and not on those of the appellate court."

The decree rendered in the court below years ago adjudicating the title to the land in suit, not having been impaired in any way by anything said or done by this court remains in full force, the same as if no appeal had ever been taken. It could not therefore be changed after the lapse of the term, and no part of the decree of this court whether negative or affirmative can be "changed at a subsequent term in matters of law, whether attempted on motion, or a new writ of error, or appeal on the mandate to the court below."

Bank of U. S. v. Moss, 6 How., 40.

In *Tyler v. Magwire, 17 Wall,, 283,* a mandate had been sent to the Supreme Court of Missouri, in a chancery cause, reversing the decree of that court, and "for further proceedings in conformity with the opinion of the court." The court below found that this court had settled that the legal title to the land in suit was in the plaintiff, and dismissed his bill on the ground that he had an adequate remedy at law.

This court, in considering this state of the case said:

"By the directions of the mandate they [the court below] were as much bound to proceed and dispose of the case in conformity with the opinion of this court as to reverse their former decree; but instead of that, they entered a new decree dismissing the petition, which in effect evades the directions given by this court, and practically reverses the judgment and decree which the mandate directed them to execute. Argument to show that a subordinate court is bound to proceed in such an event, and dispose of the same

as directed, and that they have no power either to evade or reverse the judgment of this court, is unnecessary, as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect. Beyond all question, this court decided every question at issue between the parties which it was necessary to decide to dispose of the case upon the merits; and it is clear that it is not competent even for this court, after the term expired, to review and reverse such a decree. * * * Second appeals or writs of error are allowed; but the rule is universal that they bring up only the proceedings subsequent to the mandate, and do not authorize an inquiry into the merits of the original judgment or decree."

In *Corning v. Troy Iron Factory, 15 How., 451*, the defendant in a suit in equity had two grounds of defense; the Circuit Court decided against him on one and dismissed the bill as to the other. On appeal to this court the decree was reversed and the cause remanded; and it was held that he could not then appeal from the decision of the Circuit Court on the ground originally decided against him. The court said: "It is plain therefore, that under the guise of an appeal from the decree of the Circuit Court, this is an appeal in fact from the decision of this court. For there is no other decree existing in the case except the decree of this court. There must be an end of litigation some time. To allow a second appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. * * * When the decree is either affirm-

ed or reversed by the appellate court, it becomes the decree of that court, and cannot be the subject of another appeal. * * * A second appeal lies only when the court below, in carrying out the mandate of this court, is alleged to have committed an error. But on an appeal from the mandate it is well settled that nothing is before the court but the proceedings subsequent to the mandate."

See also *John Hancock Ins. Co. v. Manning*, 7 *Fed. R.*, 299.

In *Stewart v. Salamon*, 95 *U. S.*, 361, the cause had been reversed, and remanded for further proceedings, and the defendant asked leave to file a plea of *lis pendens*, and to amend the answer to the original bill, which was refused. On a second appeal this court said:

"This is an appeal from a decree entered upon our mandate. No complaint is made as to its form, and it seems to be in all respects according to our directions. The effort of the appellant was to open the case below, and to obtain leave to file new pleadings, introducing new defenses. This he could not do. The rights of the parties in the subject-matter of the suit were finally determined upon the original appeal; and all that remained for the Circuit Court to do was to enter a decree in accordance with our instructions and carry it into effect. If in the progress of the execution of the decree, after its entry, either party is aggrieved, he may appeal from the final decree in that behalf; but such an appeal will bring up for re-examination only the proceedings subsequent to the mandate."

In *Williams v. Gibbes, 17 How., 258*, the decree of the court below was reversed, the court saying:

"Upon the whole, after the fullest consideration we have been able to give to this case, we think that the decree of the court below was erroneous, and should be reversed."

The case involved the responsibility of the executors of one Oliver and after the case was sent down, they contended that they had paid out a large part of the fund in their hands before the filing of the bill. After the filing of the mandate, it was necessary, as in this case, to take an account. As to this matter, this court, on a second appeal, said:

"It is claimed that it was shown before the master that this portion was paid over in the regular course of administration, and as in duty bound by the laws of the State of Maryland. If this had appeared when the cause was heard upon the merits, and the question as to the right of this fund was determined, the ground now taken might possibly have been a good defence to that portion of the fund; and the complainant would have been sent to the distributees to recover it. * * * But be this as it may, we think the question of liability, to the extent of the whole fund, was disposed of in the case when before us on its merits, and was not reserved for the hearing on the adjustment of the accounts before the court below on the coming down of the mandate."

The court, however, held that after the mandate had been filed, the parties might file a supplemental snswer as to the matter of the accounts, which would serve to facilitate the proceedings before the master.

In the case of *Sibbald, v. U. S., 12 Pet., 494*, the court said:

"The court below acts under our mandate to execute our decree on those matters which remained for their future action, which is to be done in the same manner *pro tanto* as when the whole case was originally before it in the first instance, according to the provisions of the first section of the act, with this exception: they cannot act on any question of the title of the party to the full quantity confirmed, or decide against the validity of the surveys which have been confirmed by this court. So far as our decree goes, it must be taken to be conclusive."

Williams v. Gibbes, 20 How., 540.

In *Durant v. Essex Co., 101 U. S., 555*, the court said:

"Waiving all questions as to the right of appeal from such an order, we are clearly of the opinion that the Circuit Court could do no otherwise than it did. On a mandate from this court affirming a decree, the Circuit Court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. Our judgment by a divided court is just as much our judgment, for all the purposes of the case in hand, as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below. After the appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution. We might have ordered a modification so as to declare that the dismissal

should be without prejudice. We did not do so. The Circuit Court had no power after that to do what we might have done and did not do."

It would seem from the so-called exceptions to the decree that proof of the defences now sought to be interposed was made before the final hearing. So that they have been passed on both by the court below and by this court. If that is true, then there is an end of the matter, if it is ever to have an end. But if this is not true, and the "exceptions" propose to set up new defences, the result is precisely the same; for any defence not interposed at the final hearing in chancery is conclusively presumed to have been abandoned.

The case of the *Santa Maria*, *10 Wheat*, *441*, is one that was cited in the court below for the defendant, and as it was also cited by us, we may as well refer to it here.

The subject of the suit having been captured, was libelled by the Spanish consul, and a decree of restitution had been rendered in his favor, which was affirmed by this court. The property being in the hands of the court below, it was necessary to dispose of it. It had been turned over to one Burke on a stipulation to pay the appraised value according to the future decree of the court; and he now claimed that he should be allowed for money paid for insurance and for duties. A new party, Forbes, also came in with Burke, and they set up a claim for freight. The consul also claimed that the amount named in the stipulation should bear interest. Of course the property could not be restored without settling any and all legal claims involving admiralty liens, which might be enforced at any time, unless lost in some way or abandoned. New

claims might be made upon the fund at any time, as long as it was in the hands of the court; but as to parties that were before the court on the first hearing any claims not by them urged in due and legal manner were thereby abandoned. The court say:

"In the first place, it is asserted that Mr. Burke is a *mala fide* claimant, entitled to no favor whatever; and by reference to the original proceedings, will be found a party to the wrongful capture and detention of the property. And the first question, therefore, that arises, is, whether upon this appeal the court can look into these proceedings for the purpose of ascertaining the guilt or innocence of the claimant? The principle laid down in the case of *Rose v. Himely, 5 C., 313*, that, upon an appeal from a mandate, nothing is before the court but the proceedings subsequent to the mandate, is undoubtedly correct in the sense in which that expression is used, with reference to the doctrine of that case. Whatever had been formerly before the court, and was disposed of by its decree, was considered as finally disposed of; and the question of interest raised upon the execution of the mandate in that case, was in that predicament. But upon all proceedings to carry into effect the decree of the court, the original proceedings are always before the court, so far as they are necessary to determine any new points or rights in controversy between the parties, which were not terminated by the original decree. The court may, therefore, inspect the original proceedings, to ascertain the merits or demerits of the parties, so far as they bear on the new claims, and must decide upon the whole examination what its duty re-

quires. In the present case, it is impossible to separate the stipulation from the other proceedings. It is unintelligible without reference to them. The court must inspect them to guide in its future acts, and to enable it to carry into effect the decree of the Supreme Court. That decree restores the property generally, as claimed by the libellant; but what that property is, in what predicament it is, and what are the means by which it is to be restored, must be ascertained before the court can institute any further proceedings.

"Another preliminary question is whether the subject-matter of these claims is, in this stage of the cause, open for discussion. All the claims of Mr. Burke might certainly have been brought forward and insisted upon in the original proceedings. If his right to the property was not established he might be entitled to equitable deductions for meliorations or charges; and if these claims were favored by the court, the decree of restitution would have been subject to these deductions. They would then have constituted a lien upon the property, and the Circuit Court must have enforced it. But no such claims were insisted upon in the written allegations, or even *viva voce*, at the hearing; the omission was voluntary, and the decree of restitution passed in the most absolute and unconditional form. The consequences of now admitting them to be brought before this court by appeal, would be most inconvenient and mischievous in practice. It would encourage the grossest laches and delays. The party might lie by through the whole progress of the original cause, until the final decree, holding the real owner out of his property, and securely enjoying, as in this case, the profits, and

then start new claims for future investigation, which would protract the final decision to an indefinite period. Such a course would have a tendency justly to bring into disrepute the administration of justice and inflict upon the innocent all the evils of expensive litigation. We think, therefore, that upon principle every existing claim which the party has omitted to make at the hearing upon the merits, and before the final decree, is to be considered as waived by him, and is not to be entertained in any future proceedings; and when a decree has been made, which is in its own terms absolute, it is to be carried into effect according to those terms, and excludes all inquiry between the litigating parties as to liens or claims which might have been attached to it by this court, if they had been previously brought to its notice."

In *Mackall v. Richards, 112 U. S., 375*, the direction as to the further disposition of the cause was as follows:

"The decree must be reversed and the cause remanded, with directions to the court below to set aside the decree from which this appeal is prosecuted, and to order the sale in satisfaction of the complainant's demands, and in such mode as may be consistent with the practice of the court and with law, of lot seven outside of the part upon which the building known as the Palace Market stands."

After various proceedings in the court below on the mandate, the case came again before this court, and is reported as *Mackall v. Richards, 116 U. S., 47*. The court said:

"A motion was made by Mackall in the court below, after the mandate was received, for leave to file what was called a 'Supplemental Bill,' but which was in reality a sup-

plemental answer to the original bill, setting up new defences growing out of matters occurring since the original decrees. This was properly denied. No discretion was left in that court to grant such a motion. The order of this court was in effect to enter the precise decree that has been made. If since the original decree the debts have been paid, or any else has happened which makes it improper to carry the decree into execution, resort must be had to some form of original proceeding appropriate to relief on that account. It cannot be done by way of defence before decree on our mandate. The order of this court places the case where it would be if the original decree had been what it is now."

In *Hickman v. Ft. Scott, 144 U. S., 417*, there had been a writ of error to a judgment in a suit to enforce payment of city bonds. This court reversed, with direction to enter judgment for plaintiff on one bond and for defendant as to the others. After that the plaintiff attempted to do what the defendant is trying to do in this case, to set everything at large, and go back to the beginning, so that the theme might be constantly reproduced, with additions and variations, as it is in the story of the "House that Jack Built." He filed a motion for a new trial "on account of gross and vital errors in the finding or facts," and to have the record amended "by allowing certain findings of fact to appear, some of which findings were unavoidably and others accidentally omitted;" stating that "it is desired only that the record should be so amended as to state as well as import the truth, and that the plaintiff should have an opportunity of having the actual facts of the controversy taken into con-

sideration by this court, and, if necessary, by the Supreme Court, before the matter finally passes in *rem judicatam*. The decision of the Supreme Court was based upon an imperfect and erroneous report of the cause; and all that the plaintiff now desires to do is to have the record placed in such shape that the truth may be judicially ascertained before final judgment against him."

The court refused the motion, and its judgment was affirmed here, the court saying: "We know of no precedent for such a proceeding as this, nor is there any principle of law upon which it could be based."

It is suggested that the judgment and mandate in this case are ambiguous. It is not practicable to set out in either the full directions and conclusions contained in the opinion of the court, nor is it usual to do so. Both the judgment and the mandate refer to the opinion of the court, which is thereby made a part thereof; and certainly no opinion was ever less ambiguous.

In *West v. Brashear*, *14 Pet.*, *54*, the court said:

"There has been some discussion at the bar as to the principles by which a Circuit Court of the United States is to be governed when executing a mandate from the Supreme Court. Undoubtedly, the mandate must be its guide. It is the judgment of this court transmitted to the Circuit Court. And when the direction contained in the mandate is precise and unambiguous, it is the duty of the Circuit Court to carry it into execution, and not to look elsewhere for authority to change its meaning. But when, as in this case, the Circuit Court are referred to testimony to ascertain the amount to

be decreed, and are authorized to take new evidence on the point, it may sometimes happen that there will be some uncertainty and ambiguity in the mandate; and in such a case, the court below have unquestionably the right to resort to the opinion delivered at the time in order to assist them in expounding it. And if, in this case, it had appeared from the opinion delivered, that, in speaking of the ginseng shipped and sold by Latimer, the court intended to confine the credit to the value of that portion of it owned by Brashear at the time of the shipment, and to exclude that alleged to have been taken by Latimer, it would have been the duty of the Circuit Court to execute the mandate in conformity with this intention."

In *Supervisors v. Kennicott, 94 U. S., 498*, there was an error in the judgment, inasmuch as it directed a new trial in a chancery case. On a second appeal the court said:

"It is true that after reversing the decree of the Circuit Court upon the former appeal it was further ordered that the cause be remanded 'with directions to award a new trial;' but the mandate as sent down 'commanded that such execution and further proceedings be had in conformity to the opinion and decree of this court, as according to right, etc., ought to be had.' Technically there can be no "new trial" in a suit in equity; and as our mandates are to be interpreted according to the subject matter of the proceeding here, and, if possible, so as not to cause injustice, *Story v. Livingston, 13 Pet., 359*, it is proper to inquire what must have been intended by the use of that term in the decree, since it cannot have its ordinary meaning. For that

purpose, we held, in *West v. Brashear, 14 Pet., 51*, that resort might be had to the opinion delivered at the time of the decree. Availing ourselves of this rule, it is easy to see that there could have been no intention to open the case for further hearing upon the issues presented and decided here. There is not an expression of any kind in the opinion indicating any such determination. On the contrary, it is distinctly declared that the mortgage was valid, and that these complainants were entitled to their judgment. Under these circumstances, it is apparent that the words 'new trial' were used to convey the idea of such further action as should be found necessary to carry into effect what had been already decided. No error has been assigned upon the proceedings in the Circuit Court under the mandate construed in this way, and the decree of the Circuit Court is therefore affirmed."

It has been very often decided by this court that a cause cannot be brought to it by piece meal, that before any judgment or decree can be appealed from, it must be final, "must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance of it here, the court below would have nothing to do but to execute the judgment or decree it had already rendered."

Bostwick v. Brinkerhoff, 106 U. S., 3, and cases cited.

In the court below, counsel for defendants cited certain cases, which we shall now proceed to notice. It will be seen that they have no bearing on the points in controversy.

Exparte Medway, 23 Wall., 504.

This was an appeal from the court of claims; a court that sits as a common law court for the adjudication of claims. The judgment was reversed and practically a new trial was ordered. Counsel contended that the reversal of the judgment did not put it in the power of the lower court to go back of its previous finding of facts; but it is clear that this finding of facts was an integral part of the judgment that was reversed, just as the verdict of a jury would have been if the judgment had been based on a verdict. Accordingly this court held that the lower court had the power to restate the facts.

Exparte French, 91 U. S., 423.

This was ejectment, submitted to the court, and finding of facts. The judgment here was reversed on the finding of facts. Afterwards, speaking of the previous decision, and the contention of plaintiff on application for mandamus that he was entitled to peremptory judgment, the court said:

"The finding brought here for review was special, and met only a part of the issues. If the conclusion of law to which the court came was correct, the other issues were immaterial. The case was disposed of without reaching them. We have however determined that the facts found were not sufficient to justify the conclusion reached, and have ordered the court to proceed with the case notwithstanding the finding. *In effect we have decided that the court erred in not proceeding to try the other issues.* Our action only precludes the court from adjudging in favor of the defendants upon the special facts found and sent here for our opinion."

Ex parte Sawyer, 21 Wall., 239.

No case more favorable for our contention could be found. The case was in admiralty. A stipulation had been filed by sureties, but at the time of the decree no action had been taken on it. An appeal was taken, and the decree below was affirmed.

This court said:

"It is not denied that the liability of the principal respondents was fixed by the decree of the Circuit Court. The appeal took away from that court all power over that part of the decree. Upon the affirmance in this court that liability was conclusively settled, and the mandate left nothing for the Circuit Court but to proceed in the appropriate manner for the collection of the money found due."

The court added:

"But the sureties occupy a different position. No decree was entered against them before the appeal. The order was that a judgment be entered if an appeal was not taken. The appeal was taken, and therefore this order never became operative. * * * The sureties upon the stipulation are entitled to an appeal from any decree that may be rendered against them. A decree against the principal respondents does not necessarily include them. Additional proof is required before they can be charged. Here the decree was absolute against the principal respondents alone. The order against the sureties was provisional only. They could not appeal from that because it was not final. It is clear therefore that the power of the court over that part of the case was not at an end when the appeal was taken, and that if the sureties were to be charged at all it must be by a decree to

be entered after the cause was sent back from here. From that decree another appeal must be allowed, or the sureties will be bound by a proceeding to which they were and could not be parties."

Marine Ins. Co. v. Hodgson, 6 Cranch, 217.

Action on a policy of insurance, judgment for defendant reversed on error. On return of the cause to the lower court the defendant asked and was refused leave to file two additional pleas. On a second writ of error this court held that this decision involved a matter of discretion of which error could not be assigned, and the judgment below was affirmed.

Certainly we do not contend that after a reversal that goes to the judgment in a law case the court below cannot permit the pleadings to be amended. There must in such case be a new trial, and the mandate leaves the case just as it was immediately before the former trial.

Rose v. Himely, 5 Cranch, 316.

The mandate went down directing "the cargo of the Sarah to be restored to the original owners subject to those charges of freight, insurance and other expenses which would have been incurred by them in bringing the cargo into the United States."

The question was as to whether the court below could allow interest on the charges and expenses. This court said:

"Had the mandate issued to restore to the party a flock of sheep, or stock, or bonds bearing interest, it is presumed that it would have been construed to authorize the delivery of their natural or artificial increase without any express words

to carry them. But it is said that the mandate does not expressly authorize this allowance. This is true; but it must be recollected that the mandate of this court enjoins the allowance of equitable deductions."

Walden v. Craig, 14 Pet., 154.

Ejectment. Plaintiff moved to amend his declaration, which was refused. He brought error. This court held that there was no final judgment, and dismissed the writ, saying, however, that the motion should have been allowed, and that the motion could be renewed.

Walden v. Craig, 9 Wheat., 576.

Afterwards the motion was renewed and granted, and on the second writ of error *(14 Pet., 154)*, this was held not to be error. The same litigation came before the court again. (*Walden v. Bodley, 9 How., 45.*) There had been several ejectment suits, and an injunction suit, the latter of which had come to this court on appeal, and the court had sent down a mandate directing the Circuit Court "to take such farther steps in regard to the improvements, and to the putting Walden or his representative in possession of the premises recovered in the ejectment suits as shall be conformable to the decree hereby affirmed, and to the principles of equity."

9 How., 45.

On a later appeal this court held that it was "necessary to refer to the ejectment suits to see what premises were recovered." (*Id.*) This was done simply in execution of the mandate, and introduced no new element into the litigation, and did not require any second litigation of matters

previously controverted, or that might have been put in controversy.

Such are the cases that were cited in the court below. Comment seems to be unnecessary.

What are the grounds of this extraordinary contention? Two; that each defendant was an innocent purchaser. This was set up in each case before the final decree. (*Tr. in case No. 13, 467, p. 5.*) They say now that the court below was of the opinion that that defense could not be interposed by one holding under a quitclaim deed, and that he held under a deed of that kind. Yet he took an appeal. Why did he not bring that question before this court as McDonald did? He had his day in the court below, and he has had his day in this court. How many opportunities of making a defense does the law guaranty to him, and when is it proposed that the litigation shall ever end?

Again, it is said that the lots as laid out by the Hot Springs Commission and as sued for do not in their boundaries exactly coincide with the parcels of land previously leased by Gaines. Conceding that to be so, why was not that fact, if important, interposed as a defense? Obviously because either it is not true, or because if true, it could not avail anything. For the law is well settled that if a tenant encroaches upon neighboring lands, and by long possession acquires a title thereto, that title will enure to the landlord as a mere incident of the estate. This is true though the land encroached upon may not adjoin the land that was leased, and though the two parcels may have been separated

by waste land, or by a fence, or by a stream, a fence and a path.

1 Washb. Real Estate, ch. viii, sec. 1 a., p. 556 and cases cited.

If the practice suggested by this case could obtain the sanction of this court one might expect that a few thousand years hence a new edition of the "*Doctor and Student*" would appear in several hundred volumes, sufficiently modernized for contemporary use, and containing a passage literally as follows:

"*Doctor.* Let us suppose, my son, that a trial court should decide against you, (which God forfend,) and yet you deemed yourself in the right, what course wouldst thou pursue?

"*Student.* Though, most learned father, I am but green and unripe in matters of this sort, yet methinks that I sould take an appeal.

"*Doctor.* And therein wouldst thou act both wisely and well. And supposing that the decree or judgment of the lower court should be reversed, what then would be thy purpose?

"*Student.* I should then methinks endeavor to get the trial court studiously to conform to the judgment rendered by the higher court, to correct the errors previously committed, and to do those things which it should have done in the first instance.

"*Doctor.* Therein wouldst thou do neither wisely nor well. In the cloudiness and immaturity of thy mind thou hast indeed hit upon a historical phase of the law as it existed

when the law itself was cloudy and immature; for formerly such was the practice, though happily long since changed; the law having at one time considered that it was to the interest of the republic that there should be an end to litigation; a doctrine that has long since been eradicated by the hand of advancing civilization, it being now well known that the longer a law suit can be made to last the happier everybody will be; from which consideration has risen the great modern doctrine of *Co-ordinate and Correlative Cunctations*, based upon the great modern maxim *Cunctatio res optima est*; whence it is inferred that no appeal shall ever be held to settle more than a single point, or the smallest fraction thereof. The origin of this important principle was long lost in the night of time until it was discovered through the labors of the learned and ingenious Stipendarius, whose invaluable commentaries were published in the latter part of the thirty-second century. According to that painstaking and accurate writer there had long been a litigation in the courts growing out of the title of what were known as the Hot Springs, within the limits of the present Anarchy of Arkansas, which in that remote age, before the cooling of the earth's crust, naturally supplied water of a high degree of temperature, which was supposed to possess certain medicinal qualities; a litigation that had been before the Supreme Court of the United States in various forms for the better part of a century. Finally some of these cases, believed to be the last, got in such a condition that nothing more was required to be done except to restate an account that was defective in one or two small particulars. This seemed to be perillously near the end of a litigation that

had survived many clients, many lawyers and generations of judges. Iconoclastically enough certain persons did, it seems, propose to end the suit by a speedy solution; but others, more retrospectively inclined, suggested that profitable prolongation might be educed by beginning over again as if nothing had been done; and in this view the court readily concurred, though in that barbarous age the action of the court was looked on by some as an innovation; and hence arose what is now known as the *System of Progressive Appeals*, which is at present the most favored of all our modern institutions. Under its benignant influence the courts never do any harm, they never involve themselves in contradictions, or find it necessary to overrule any previous decision, for they never attempt really to settle anything, and any defendant can keep a case in court forever and a day. The beneficial effect of this wise cunctation was aptly vindicated by the subsequent history of the litigation referred to; for the last report of those cases is found in the 10564th volume of the Reports of the Supreme Court of the United States, and it appears by the date of the report that the case was decided the very year that the springs lost their phenomenal heat that had long rendered them celebrated, which of course destroyed their value. So that by waiting for the inevitable arbitrament of time the courts lent their aid to the slow but unerring forces of nature. These matters form a small though useful part of the great *Lex Fabia*, of which we will discourse more fully at another time. It has sometimes been objected that the System of *Progressive Appeals* is not suited to the natural brevity of human life; but the objection is not

well founded, as anyone can see that the law has no jurisdiction over longevity.

"*Student.* How long, learned father, may it be since the doctrine of *Progressive Appeals* became established?

"*Doctor.* Many thousands of years, my son. Indeed, it is thought to have had its origin in the year of Grace, 1893; and from a careful investigation of monumental and mortuary inscriptions some later writers have inferred with seeming propriety that it was first suggested by certain progressive social games that were more or less common in that primitive age."

Here, after the lapse of years, it is gravely proposed to set aside the decree of the court below, which has been solemnly affirmed by this court on the thin pretence that the land is not sufficiently identified, and other grounds equally illusory.

If that can be done, the question naturally arises as to what value can be attached to a decree on the merits rendered by this court, the result of much labor and expense and years of waiting. The answer is easy. Vanity of vanities, and worse. Such a decree, with the doctrine asserted by the court below, would be even less efficacious than the aforesaid Statute of Uses, of which Lord Hardwicke said:

"A statute made upon great consideration, introduced in a solemn and pompous manner, by a strict construction has had no other effect than to add, at most, three words to a conveyance."

Hopkins v. Hopkins, 1 Atk., 591.

Respectfully,

U. M. ROSE,
G. B. ROSE,
} For Petitioners.

12 Orig. Docket

In the Supreme Court of the United States.

WILLIAM H. GAINES, ALBERT B. GAINES, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARIA GAINES, DECEASED, WILLIAM H. GAINES, JR., FANNIE G. WILLIAMSON, LOUISA BLASDELL, AUGUSTA STITT, MARY P. GAINES AND ALBERT B. GAINES, *Petitioners*.

v.

HENRY C. CALDWELL AND GEORGE G. LATTA.

PETITION FOR MANDAMUS.

U. M. & G. B. ROSE,
For Petitioners.

...WOMACK DEMOCRAT CO., LITTLE ROCK.

In the Supreme Court of the United States.

WILLIAM H. GAINES, ALBERT B. GAINES, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF MARIA GAINES, DECEASED, WILLIAM H. GAINES, JR., FANNIE G. WILLIAMSON, LOUISA BLASDELL, AUGUSTA STITT, MARY P. GAINES AND ALBERT B. GAINES, *Petitioners*.

v.

HENRY C. CALDWELL AND GEORGE G. LATTA.

PETITION FOR MANDAMUS.

Your petitioners would respectfully show that on the 23rd day of May, 1884, said William H. Gaines and Maria Gaines, his wife, filed their bill in chancery in the United States Circuit Court for the Eastern District of Arkansas against J. L. B. Caver and George G. Latta, in which the plaintiffs alleged that under the laws of the United States relating to the Hot Springs reservation they had the right to enter and purchase from the United States a certain lot in the town of Hot Springs, described as lot 8 in block 130, which they had previously leased to said Caver; and said Caver afterwards sold his interest in said lease to said Latta and one Walter A. Moore, who was not sued therein; that both the said William H. Gaines and said Caver filed their

claims before the Hot Springs Commission to be allowed to purchase said lot, and that, by a mistake and error of law, the said commission allowed said Caver a preference right to purchase the same, and that he had since received a patent from the United States for the said lot.

That on the 7th day of August, 1884, said Latta and said Caver filed their answer setting up various defenses to said bill; that much testimony having been taken on either side, said cause came on for final hearing on the 8th day of November, 1887, when the said court found that the right to purchase said lot had been allowed to said Caver by said commissioners by an error and mistake of law, and that in consequence thereof a patent had been issued to him by the United States; that said Latta had purchased an undivided half of the said lot before said award was made, and while said petitions were pending before said commissioners, which one-half the court found he held for the sole use of the plaintiffs in said suit; for which reason the court decreed that all the right and title of said Latta in and to said lot should be divested out of him and vested in said plaintiffs, their heirs and assigns forever; and the court directed that an account should be taken of the rents of said land and the taxes and improvements paid and placed thereupon, and that the master, to whom reference was made, should report the same to the court.

That the said master having filed his report accordingly on the 21st day of April, 1888, said court rendered a decree requiring the said Latta to pay the plaintiffs the sum of two hundred and seventy-five dollars and thirteen cents ($275.13)

due on said account, and decreed that the said plaintiffs have and recover from said defendants the possession of the undivided half of said lot 8, and that a writ of possession issue; from which decree the said Latta appealed to this court.

That while said cause was pending in this court the death of Maria Gaines was suggested, and the said cause was revived in the name of Albert B. Gaines, as executor of her last will and testament, William H. Gaines, Jr., Fannie G. Williamson, Louisa G. Blasdell, Augusta Stitt, Mary P. Gaines and Albert B. Gaines, her legatees and devisees.

That on the 18th day of April, 1892, said cause was argued and submitted in this court; and that on the 2nd day of May, 1892, it was decided, the opinion in the said case being reported under the title of "*Goode v. Gaines*," *145 U. S., 141*, in which opinion the court held and declared that the objections taken to the decree of the court below were, so far as they related to the title to the said lot, not well taken, that there was an error in the decree below in the taking of the account, inasmuch as the said defendant ought not to have been held liable for any rents that accrued before the filing of the bill, wherefore the court ordered that the said decree be reversed, and that the said cause be remanded to the Circuit Court, with a direction for further proceedings in conformity with said opinion. All of which matters fully appear by reference to the transcript and proceedings in said cause remaining of record in this suit.

That on the 24th day of May, 1892, a mandate was issued in the said cause from this court, directed to the judges of said Circuit Court, reciting said proceedings, and command-

ing them "that such further proceedings be had in said cause in conformity with the opinion and decree of this court as in accordance to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding."

That on the 1st day of June, 1892, said mandate was filed in said Circuit Court and duly entered of record; that on the same day your petitioners filed in said Circuit Court their petition, asking that a decree might be rendered on said mandate in accordance with the same and a draft of said decree thereto annexed, by which said draft it was decreed that all right, title, claim and interest of said defendant in and to said lot be divested out of him, and that the same be vested in said plaintiffs, and that an account between said plaintiffs and the defendant be stated in accordance with the directions contained in said mandate.

That on the 21st day of December, 1892, your petitioners filed in said court a petition praying for a writ of possession for said lot.

That on the 6th day of January, 1893, said defendant, Latta, filed in said court, which was held solely by said Henry C. Caldwell as Circuit Judge presiding therein, his exceptions to said proposed decree upon the following grounds:

1. That said proposed decree is not in accordance with the terms of said mandate, as it does not reverse said decree, but in fact affirms the same.

2. That it appears by the proofs in the record that the appellees just after the award, and often afterwards, declared that they were content with the awards made by the com-

missioners, and that thereby they are estopped from setting up any claim to said lot.

3. That the lot sued for embraced a piece of land not included in the lease referred to in the bill herein.

4. That the plaintiffs claim a title to said land as heirs of Ludovicus Belding, four in number, of whom Maria Gaines was one, and two others were Henry and Albert Belding; and that there is no proof in the record that the plaintiffs ever became possessed of the interests of said Henry or Albert.

5. That one of the defenses relied on by the defendant at the hearing was that he was an innocent purchaser for value without notice though he had accepted a quitclaim deed for said lot; that this court was of opinion that such a defense could not be based on a quitclaim deed, but that the Supreme Court of the United States has since ruled otherwise; that there is no proof in the record showing that appellant had notice of the claim of the appellees, and he now denies that he had such notice, and says that decree ought not to be rendered without proof of such notice.

6. No decree should be rendered until this court is fully advised of the extent of the leased property, its exact location, and what part of it, if any, was included in said lease.

7. There is no proof in the record showing that the property described in the lease is identical with lot 8.

8. There is no proof in the record that appellees ever acquired the interest of Henry and Albert Belding.

9. There is no proof in the record that appellant had notice of the lease described in the bill at the time of his

purchase, but it appears from the proof that he bought without notice, paying full value, and that the plaintiffs publicly proclaimed that they were content with the awards, and would not seek to disturb them.

10. There is no proof in the record on which to base a decree in favor of the appellees.

11. The appellant prays for a decree of one-half of the costs of the transcript on the appeal to the Supreme Court.

12. No judgment or decree should be rendered in favor of appellees for costs until this cause is finally disposed of; and when said decree is rendered, if rendered at all, the rule adopted by the Supreme Court of the United States should be followed by this court—that is each party, in case the judgment or decree is in favor of the appellees, to pay one-half of the costs.

Your petitioners would further show that on the 7th day of January, 1893, said petitions and exceptions were submitted to said court, held by said Caldwell as aforesaid, when the court entered an order on record declaring that the court was of opinion that the said exceptions were well taken, and that the defendant herein should be allowed, if he so elected, to take further testimony in support of his said exceptions by way of defense to the title to the land in controversy, and that this cause should be set down upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands. Wherefore the court ordered that said exceptions be sustained, and that said decree as aforesaid be not entered; but that as the plaintiffs announced their purpose to apply to the Supreme Court of the United States for a writ of mandamus

to compel the entry of said decree, and the court being willing to expedite the said proceedings, it was ordered that said proposed decree and the petition of the plaintiffs for the entry thereof be made a part of the record in said cause, and that the petition for writ of possession aforesaid be overruled.

Whereupon your petitioners excepted to said several rulings, and asked that their exceptions be noted of record, which was accordingly done.

All of which will be seen by reference to the copy of said orders and proceedings beginning with the said mandate and concluding with the said last named order, which is the last order made in said cause, herewith filed, marked Exhibit "A" and made a part hereof.

Now, wherefore, as it manifestly appears that the said court has committed an error in not obeying the mandate of this court made as aforesaid, your petitioners now pray that a writ of mandamus may issue to the said Henry C. Caldwell, as judge of the United States Circuit Court for the Western Division of the Eastern District of Arkansas, commanding him to enter the said decree as prayed for by your petitioners, and to cause a writ of possession to issue as prayed by them, or to take such other steps as may be necessary for the proper enforcement of the decree of this court, and for all other proper relief; and your petitioners will ever pray.

U. M. ROSE,
G. B. ROSE,
For Petitioners.

STATE OF ARKANSAS, }
County of Garland, } ss.

On this day appeared before me, a notary public in and for said county, William H. Gaines, who, being by me first duly sworn, stated that the matters set forth in the foregoing petition are true. Wm H. Gaines

Subscribed and sworn to before me on this 18th day of January, 1893.

In testimony whereof I have hereunto set my hand and official seal this 18th day of January, 1893.

J. W. Carrington
Notary Public.

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UNITED STATES OF AMERICA,

WESTERN DIVISION OF THE

EASTERN DISTRICT OF ARKANSAS.

BE IT REMEMBERED, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the eleventh day of April, Anno Domini, one thousand eight hundred and ninety-two, at the United States court

room, in the city of Little Rock, Arkansas, the Honorable John A. Williams, District Judge, presiding and holding said court, the following proceedings were had, to-wit: On June 1, 1892.

Wm. H. Gaines *et al.*

v. [No. 662.]

George G. Latta.

Now, on this day came said plaintiffs, by U. M. & G. B. Rose, Esqrs., their solicitors, and by leave of the court they file the mandate of the Supreme Court herein, which is in words as follows:

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the Circuit

[SEAL.] Court of the United States for the Eastern District of Arkansas:

GREETING—

Whereas, lately in the Circuit Court of the United States for the Eastern District of Arkansas, before you, or some of you, in a cause between William H. Gaines and Maria Gaines, his wife, complainants, and J. L. B. Caver and George G. Latta, defendants, wherein the decree of the said Circuit Court, entered in said cause on the 21st day of April, A. D. 1888, is in the following words, viz:

"Now, on this day come the plaintiffs by their solicitors, M. W. Benjamin, R. J. Davies and U. M. & G. B. Rose; and also comes the said defendant, George G. Latta, by George G. Latta, his solicitor, and the special master having

heretofore filed his report herein, and this case now coming on for hearing, and the court having heard the argument of counsel, and being now sufficiently advised as to the further decree to render herein, it is ordered, adjudged and decreed that all the exceptions of the defendant to the master's report be, and the same are, overruled; to which ruling defendant excepts; and thereupon the court finds and states the account between the plaintiffs and defendant as follows:

"To amount due plaintiffs for rent, according to the terms of the lease, from the date of award to the date of the filing of the bill in this case, and the interest, $1,942.63.

"To amount due him since said date, and until the filing of the master's report, rental value of the property and interest, $1,242.02.

"To amount of rent to date of this decree, $2,000.

"Amounting in the aggregate to the sum of $3,386.35.

"By amount due the defendant for taxes paid and interest, $637.04.

"By amount of purchase money paid by him to Government for said lot, and interest, $351.04.

"By present value of improvements, $1,800.

"Which said sum amounts in the aggregate to ———.

"Which leaves the sum of $275.13, which the court finds to be the balance now due.

"It is therefore ordered, adjudged and decreed that the said plaintiffs are to have and recover from said defendant said amount of $275.13 and all costs of this suit, and that they have execution therefor.

"And it is further ordered and decreed that the said

plaintiffs do have and do recover from said defendant the possession of the undivided half of said lot 8, in block one hundred and thirty, (130), and that a writ of possession issue, and serving a copy of this decree shall be the writ.

"It is further ordered that N. W. Cox be allowed the sum of one hundred dollars ($100) for his services as special master herein.

"And the defendant prays an appeal to the Supreme Court, which is granted; and it is ordered that upon his executing and filing a bond within the time, and conditioned as prescribed by law, in the sum of fifteen hundred dollars ($1,500), and a cost bond for two hundred and fifty, (250), with good approved security, the decree be superseded pending said appeal," as by the inspection of the transcript of the record of the said Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by George G. Latta, agreeable to the act of Congress in such case made and provided, fully and at large appears; and,

Whereas, At the present term of October, A. D., 1891, of said Supreme Court the death of Maria Gaines, one of the appellees in this cause, having been suggested, it was ordered that Albert B. Gaines, executor, and William H. Gaines, Jr., Fannie G. Williamson, Louisa G. Blasdell, Abner L. Gaines, Augusta Stitt, Mary P. Gaines and Albert B. Gaines, sole devisees and legatees of the said Maria Gaines, deceased, be made parties appellees herein.

And, whereas, In the present term of October, in the year of our Lord one thousand eight hundred and ninety-one,

the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby reversed, each party to pay one-half of the costs in this court.

And it is further ordered, That this cause be, and the same is, hereby remanded to the said Circuit Court for further proceedings to be had therein, in conformity with the opinion of this court.

May 2, 1892.

You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 24th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

Filed June 1, 1892.

RALPH L. GOODRICH, Clerk.

United States Circuit Court for the Eastern District of Arkansas, Western Division.

William H. Gaines et al,

v.

George G. Latta.

Come said plaintiffs and present here the mandate of the Supreme Court of the United States in this cause, and pray

that the same may be filed, and that a decree may be entered on said mandate in accordance with the draft hereto annexed.

U. M. & G. B. ROSE,

For Plaintiffs.

William H. Gaines, Albert B. Gaines, as executor of the last will and testament of Maria Gaines, deceased, William H. Gaines, Jr., Fannie G. Williamson, Louisa G. Blasdell, Augusta Stitt, Mary P. Gaines and Albert B. Gaines,

v.

George G. Latta.

Now, on this day came the said plaintiffs, by U. M. and G. B. Rose, their solicitors, and by leave of the court having filed here the mandate of the Supreme Court of the United States: Wherefore, it is now on their motion ordered, considered and decreed by the court that all the right, title, claim and interest of said defendant in and to lot 8, block 130, in the City of Hot Springs, be, and the same is, divested out of him and that the same be vested in said plaintiffs, and that the account between said plaintiffs and said defendant be stated in accordance with the directions contained in said mandate, and that in taking said account said defendants be charged with the rental value of said lot from the 23rd day of May, 1884, or during such portions of said time as they may have kept said plaintiffs out of the possession thereof down to this date, with interest on the same from the end of each year, at the rate of six per centum per annum; no additional rent, however, to be charged to said defendants by reason of any improvements placed on said lot by said de-

fendants, and that said plaintiffs be charged with all taxes paid by said defendants on said lots from the 23rd day o May, 1884, with interest on the same from the time of such payments until this date, at the rate of six per centum per annum; also with the present value of all improvements placed by said defendants on said lots as the same may appear at this date; also the sum of two hundred and fifty-six dollars paid by said defendant to the United States for said lot, with interest on the same at the rate of six per centum per annum, from January 1, 1882, until this date, and that said defendants pay all the costs by plaintiffs paid out and expended in this cause in this court, and that they have execution therefor as at law. And the special master herein is now directed to proceed to state an account between said parties according to the terms of this decree; and to that end he shall take testimony in writing of all witnesses produced, and shall report the same with all his proceedings and his findings herein to this court at the next term thereof.

Filed June 1, 1892.

RALPH L. GOODRICH, Clerk.

United States Circuit Court for the Eastern District of Arkansas, Western Division.

William H Gaines et al.

v.

George G. Latta.

Come the said plaintiffs and pray the court to issue a writ of possession to the marshal of this district, commanding him to put them in possession of the lands mentioned in the decree herein. U. M. & G. B. ROSE.

Filed December 21, 1892.

RALPH L. GOODRICH, Clerk.

In the Circuit Court of the United States, Eastern District of Arkansas, Western Division.

William H. Gaines et al.

v.

George G. Latta

Exceptions to the proposed decree filed in the above entitled cause, by William H. Gaines et al., on the 1st day of June, 1892.

Now come plaintiff in error, in the above entitled cause, and defendant in this honorable court, and excepts to the form and effect of the decree submitted for entry herein, and for cause of objection states:

1. That said proposed decree is not in accordance with the terms and direction of the mandate filed herein, in this, that said mandate directs this honorable court to enter a decree reversing the former decree of this court entered in this cause, and commands: "That such further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding," whereas the proposed decree does not, in terms or by implication, reverse any of said decree, as required by said mandate, but on the contrary, in legal effect, affirms the decree which the Supreme Court directs this court to reverse.

2. For further objection to the decree proposed by the appellees, appellant states that it appears from the proof in the record, the appellees, immediately after the award made by the Hot Springs Commission to J. L. B. Caver, openly

and publicly declared, and continued to so declare until long after the purchase by appellant, they would never make further claim to said lot, or claim antagonistic to the awards made by the said commission; that they at all times prior to the institution of the suit, expressed themselves satisfied with said awards, and content with what said commissioners had awarded them; that prior to the 12th January, 1880 (the last of the awards being made in December, 1879), Albert B. Gaines, one of the plaintiffs herein, a son of William H. and Maria Gaines, who held a power of attorney from William H. Gaines: "To do any act for me, and in my name, necessary to be done in order to secure title from the United States government to said premises, to the same effect as if personally present. My said attorney is hereby authorized to perform all such matter as he may deem necessary for the purpose of carrying out the objects herein mentioned," etc., in connection with Fannie G. Williamson, Augusta Stitt, and Mary P. Gaines, all of whom are now plaintiffs in this suit, signed a petition or memorial to the Congress of the United States wherein, among other things, it is recited:

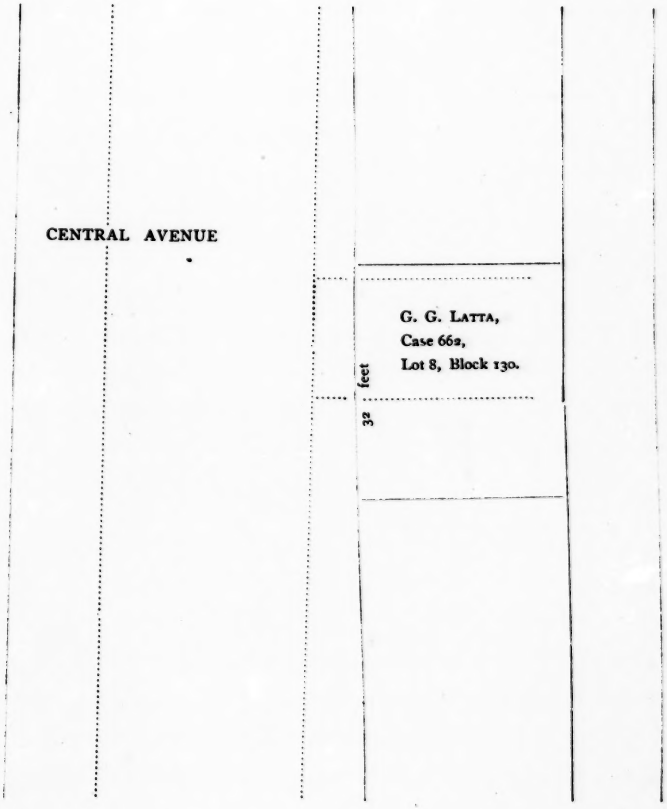
"Your memorialists, with entire unanimity, certify to your honorable body that the citizens of Hot Springs have accepted the decision of the commissioners, and the certificates based thereon, in good faith as final and conclusive as to all question of title. They intend to uphold this settlement."

That the said Albert B. Gaines, acting under the authority of the power of attorney aforesaid, to prevent Congress from passing any act giving an appeal, or allowing the

awards made by the commissioners to be reviewed or modified (a bill to that effect being then pending before Congress) under the authority of the power of attorney aforesaid, and for the purpose of preventing the award made of the lot in controversy from being disturbed, as well as the awards made to William H. and Maria Gaines, went to the city of Washington, D. C., and employed counsel to appear before the proper committees to present arguments and reason why said awards should not be disturbed, but on the contrary affirmed that the counsel so employed as aforesaid did appear under their employment as aforesaid and there make argument against Congress authorizing an appeal or review of said awards. That by reason of the said arguments the petition aforesaid, which was signed by ninety-five per cent of the persons to whom awards had been made, and the assistance of other parties similarly situated, that is having awards, Congress was induced to refrain from passing an act granting an appeal or review, and in lieu thereof passed an act that in all things confirmed the awards made by said commission. That thereafter the plaintiffs, when spoken to upon the subject of titles to property at Hot Springs, openly and publicly proclaimed that the titles to property at Hot Springs were finally and forever settled. That they thereafter advised persons to purchase lots which they, plaintiffs, had claimed before the Hot Springs commission, but which had been awarded to other parties, and in some instances they purchased lots to which they asserted claim before the commission that had been awarded to others; that relying on the aforesaid assertions and disclaimer of the title, said Latta

purchased said lot; that for a period of more than four years they thus stood by, seeing persons buying, selling and improving the lots to which they now make claim, without in any manner retracting the public statements aforesaid, or making known that they claimed any equity or equities therein; and appellant submits that such conduct amounts to an estoppel in equity as well as gross laches, which ought to prevent a recovery on the part of the plaintiffs; and if not, such negligence and laches, as would entitle the appellant, if decree should be for plaintiffs, to a decree for the purchase money paid to his vendor for the lot, and the United States, as well as for improvements, taxes and assessments, with interest from the date of each payment.

That for the purpose of showing the statuts and location of the land covered by the lease originally, and that which was left after the widening and straightening of Valley street, (now known as Central avenue), defendant furnishes a diagram or plat, whereon is shown the land taken from the Sumpter tract; that which was taken in widening and straightening the street and that which remains. That said plat is drawn on a scale of four hundred feet to the inch. The purple lines show the lots as laid out by the Hot Springs commission. The red lines show the location of the land described in the lease.


CENTRAL AVENUE
G. G. Latta,
Case 662,
Lot 8, Block 130.
32 feet

4. For further objection to the proposed decree appellant states that there were four heirs of Ludovicus Belding, deceased, under whom the appellees claim, to-wit: George, Henry, Albert and Maria, with the last named of whom William H. Gaines intermarried. That there is no proof in the records that the appellees ever became possessed of the share or interest of the said Henry or Albert Belding, either by conveyance from them or any person claiming through or under them, and plaintiff submits that if the appellees should be finally found entitled to a decree, that the decree should be limited and confined to such interest only as they acquired by conveyance from the Belding heirs, to-wit: The interest of Maria Gaines and George Belding.

5. That one of the defences relied upon by the appellant in this cause, at the hearing in which the former decrees were rendered, was, that he was a purchaser for full value from a person to whom the Hot Springs commission had awarded the lot in controversy, without notice of the claim or contention of the appellees, and exhibited a quitclaim deed showing such conveyance and purchase in good faith and as evidence of his title. That this honorable court was of opinion at the former hearing of this cause that one holding under a quitclaim deed could not be regarded as a bona fide purchaser for value without notice, and that such a deed was not sufficient to put the appellees to proof of notice. That one holding under a quitclaim deed could not avail himself of such a defence. That the Supreme Court of the United States, at the October term, 1891, (since the decision and ruling of this honorable court as aforesaid), has held,

in the case of McDonald vs. Belding, that the question of whether one was a bona fide purchaser for value without notice was one that was not to be determined by a mere inspection of the muniments of title, and that one could as well be a bona fide purchaser for value without notice, under a deed of quitclaim, as one of warranty. That such a question was one to be settled by proof. Appellant states that there is no proof in the record showing that appellant had notice of the claim of the appellees, and now denies, as is already denied by answer, that he had such notice, and submits that no decree ought to be rendered on the mandate herein in favor of appellees, as to do so would not be "according to right and justice and the laws of the United States," in the absence of proof that appellants had such notice as is averred in the bill of complaint.

6. Defendant submits that in the absence of proof as to the identity of the property described in the lease, with that of lot 8, in block 130, no final decree should be rendered in favor of the appellees until this court is fully advised of the extent of the leased property now in esse; its exact location, and what portion, if any, of the property described in the lease constitutes a part or parcel of lot 8 aforesaid.

7. Appellant objects to the rendition of the proposed decree, offered by the appellees, because there is no proof in the record showing that the property described in the lease under which appellees claim is identical with lot 8 in block 130.

8. Appellant objects to the rendition of the proposed decree offered by the appellees because there is no proof in

the record showing that the appellees ever at any time acquired the interest of Albert and Henry Belding to the claim of Ludovicus Belding, deceased.

9. Appellant objects to the rendition of the proposed decree offered by the appellees, because there is no proof in the record showing that appellant had notice of the lease described in the bill or of the pretended equity of the appellees at the date of purchase, and for the further reason that it appears from the proof in the record that appellant purchased said lot, paying full value therefor, without knowledge of the appellees' claim, and at a time when the appellees publicly proclaimed they were content with the awards of the commission, and would not seek to disturb its findings or awards.

10. Appellant objects to the rendition of the decree proposed by the appellees because there is no proof in the record on which to base a decree in favor of appellees.

11. Appellant prays judgment or decree against the appellees for $————, under section three of rule twenty-four, for one-half the costs of the transcript on the appeal to the Supreme Court.

12. Appellant submits that no judgment or decree should be rendered in favor of the appellees for costs until this cause is finally disposed of, and when said decree is rendered, if rendered at all, the rule adopted by the Supreme Court of the United States should be followed by this court; that is, each party, in case the judgment or decree is in favor of the appellees, to pay one-half the costs.

JOHN MCCLURE,
Solicitor for Defendant.

Filed January 6, 1893.
RALPH L. GOODRICH, Clerk.

UNITED STATES OF AMERICA,

WESTERN DIVISION OF THE

EASTERN DISTRICT OF ARKANSAS.

BE IT REMEMBERED, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 24th day of October, Anno Domini, One thousand eight hundred and ninety-two, at the United States Court room, in the City of Little Rock, Arkansas, the following proceedings were had, to-wit: Proceedings before the Honorable Henry C. Caldwell, Circuit Judge, on January 7, 1893:

William H. Gaines, Albert B. Gaines, Executor, William H. Gaines, Jr., Fannie G. Williamson, Louisa G. Blasdell, Abner L. Gaines, Augusta Stitt, Mary P. Gaines and Albert B. Gaines, sole devisees and legatees of Maria Gaines, deceased,

v.

George G. Latta.

Now, on this day come the plaintiffs, by U. M. and G. B. Rose, Esqs., their solicitors, and also come said defendant, by John McClure, Esq., his solicitor, and the exceptions filed by said defendant to the proposed decree on the mandate of the Supreme Court of the United States, prepared and filed herein by the solicitors for the plaintiffs, being now argued and submitted to the court, the court is of the opinion that said exceptions are well taken, and that the defendant herein should be allowed, if he so elects, to take farther

testimony in support of his said exceptions, by way of defence to the title to the land in controversy, and that this cause should be set down upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands. It is therefore ordered that said exceptions be sustained, and that said decree prepared as aforesaid be not entered, but as the plaintiffs announce their purpose to apply to the Supreme Court of the United States for a writ of mandamus to compel the entry of said decree as prepared by the plaintiffs' solicitors, and the court being willing to expedite the said proposed proceeding, it is further ordered that said proposed decree and the petition of the plaintiffs for the entry thereof be made a part of the record herein. And it is farther ordered that the petition for writ of possession filed herein by said plaintiffs be and the same is hereby overruled; and said plaintiffs except to said several rulings, and ask that their exceptions be noted of record, which is accordingly done.

(Signed.) HENRY C. CALDWELL,
Circuit Judge.

UNITED STATES OF AMERICA,
WESTERN DIVISION OF THE
EASTERN DISTRICT OF ARKANSAS.

I, RALPH L. GOODRICH, Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct and compared copy of the original remaining of record

in my office of all records and proceedings in said cause occurring after the filing of the mandate of the Supreme Court of the United States in said cause.

In witness whereof, I have hereunto set my hand and the seal of said court, this 9th day of January, in the year of our Lord, one thousand eight hundred and ninety-three, and of the independence of the United States of America, one hundred and seventeenth.

[SEAL.]

Attest: RALPH L. GOODRICH, Clerk.

130 Copy.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

WILLIAM H. GAINES, ALBERT B. GAINES, *as executor of the last will and testament of Maria Gaines, deceased*, WILLIAM H. GAINES, JR., FANNIE G. WILLIAMSON, LOUISA G. BLASDELL, AUGUSTA STITT, MARY P. GAINES AND ALBERT B. GAINES, *Petitioners*,

v.

HENRY C. CALDWELL, *as Judge of the United States Circuit Court for the Western Division of the Eastern District of Arkansas*, AND DEWITT C. RUGG,

Defendants.

PETITION FOR MANDAMUS.

U. M. & G. B. ROSE,
For Petitioners.

MARSHALL BRINKLEY CO., LITTLE ROCK.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

WILLIAM H. GAINES, ALBERT B. GAINES, *as executor of the last will and testament of Maria Gaines, deceased*, WILLIAM H. GAINES, JR., FANNIE G. WILLIAMSON, LOUISA G. BLASDELL, AUGUSTA STITT, MARY P. GAINES AND ALBERT B. GAINES, *Petitioners*,

v.

HENRY C. CALDWELL, *as Judge of the United States Circuit Court for the Western Division of the Eastern District of Arkansas*, AND DEWITT C. RUGG,

Defendants.

PETITION FOR MANDAMUS.

Your petitioners would respectfully show:

That on the 23rd day of May, 1884, said William H. Gaines and Maria Gaines, his wife, filed their bill of complaint on the chancery side of said Circuit Court against Michael Waldron, Mary Waldron, George W. Barnes and said Defendant Rugg, alleging that under the laws of the United States governing the entry and sale of lands in the reservation at Hot Springs, Arkansas, they were entitled to enter and purchase lot fourteen, in block seventy-seven, in Hot Springs, but that the Hot Springs Commission had, through a plain

mistake of law, permitted George W. Barnes, assignee of Mary Waldron, who had entered upon and held said lot as tenant of the plaintiffs, to enter said lot in his own right, over the application to enter the same lawfully made by said plaintiffs, and that by virtue of this error, Barnes, as assignee of said tenant, had procured a patent for said lot from the United States; that said Rugg had succeeded to the title of said tenant and said Barnes, and praying that defendants might be held to be trustees of said lot for the benefit of plaintiffs, for an account of the rents received by said defendants on said lot, for decree for the same, for possession of said lot, and for all other proper relief.

That on the 6th day of December, 1884, said Rugg filed his answer to said bill, setting up various defences thereto. That on the 10th day of November, 1886, said bill was dismissed as to said Mary and Michael Waldron, her husband. and that on the same day,—said cause having been previously set down for hearing, and much testimony having been taken on either side,—said cause came up for final hearing, and was argued and submitted; upon which said court found and decreed that said commissioners, by error and mistake of law, awarded the right to purchase said lot to said Barnes, who sold the same to said Rugg, who had notice of plaintiffs' claim to said lot; that under said erroneous ruling a patent had issued to said Barnes; and the court decreed that the title of said Rugg to said lot be divested out of him, and be vested in the plaintiffs and their heirs and assigns forever, and that a reference be made to a master to take an account of the rents on said lot, the taxes paid and improvements

placed on the same, with directions to report an account of the same, and that the plaintiffs recover all costs of suit.

That on the 11th day of November, 1887, the report of said master having been duly filed, said court rendered a final decree for the plaintiffs for the possession of said lot, and for a balance of $1,116.60 due on the account for rents. That from said decree said Rugg prosecuted an appeal to this honorable court, and pending said appeal, at the October term, 1891, of this court the death of said Maria Gaines was suggested, and it was ordered by this court that the suit be revived in the names of said Albert B. Gaines, as executor, and William H. Gaines, Jr., Fannie G. Williamson, Louisa G. Blasdell, Abner L. Gaines, Augusta Stitt, Mary P. Gaines and Albert R. Gaines, sole devisees and legatees of said Maria Gaines, deceased.

That the said cause having been argued in this court on the 18th day of April, 1892, was decided on the 2nd day of May, 1892, the opinion in said cause being reported under the title of *Goode v. Gaines, 145 U. S., 141*, wherein the court held that there was no error committed by the court below in any matter relating to the title or possession of said land, but that error had been committed in the court below in allowing the plaintiffs, in the account taken by the master, for rents accrued before the filing of the bill in said cause; wherefore the court reversed said decree below and remanded said cause, with directions for further proceedings in conformity with said opinion.

All which matters will appear by the record of said proceedings remaining in this court.

That accordingly, on the 24th day of May, 1892, a mandate was issued in said cause, directed to the judges of said Circuit Court, reciting said proceedings, and commanding them "that such further proceedings be had in said cause in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, said appeal notwithstanding."

That on the first day of June, 1892, your petitioners presented said mandate to said Circuit Court, and on their motion the same was filed and entered of record therein.

That on the first day of June, 1892, your petitioners filed in said Circuit Court their petition, reciting the issue and filing of said mandate, and praying for a decree specifically adjudicating to them the title and possession of said lot, and directing a reference to the master to restate said account according to the rules laid down in said opinion.

That on the 21st day of December, 1892, your petitioners filed in said Circuit Court their petition praying for a writ of possession to be issued to the marshal of said district, commanding him to put them in possession of said lot.

That on the 6th day of January, 1893, said Rugg filed in said Circuit Court his exception to said proposed decree on the following grounds:

1. That said proposed decree did not reverse the former decree.

2. That it appeared by the proofs in the cause that just after the award, and many times afterwards, appellees declared themselves satisfied with the awards made by said commission, and that by various acts and declarations they

had estopped themselves from setting up any title or right to said lot as against said Rugg.

3. That said lot includes a piece of land not embraced in the lease made by Gaines to Waldron.

4. That there were four heirs of Ludovicus Belding, under whom appellees claim, of whom said Maria Gaines was one, and that there is no proof in the record that the appellees ever acquired the title of two of said heirs, by name Henry and Albert Belding.

5. That on the former hearing in the Circuit Court, the court was of the opinion that one holding under a quitclaim deed could not be held to be an innocent purchaser for value, but that since that time the Supreme Court of the United States has held otherwise; and that there is no proof in the record to show that Rugg had such notice as would bind him.

6. That in the absence of proof of the identify of lot 14, block 77, no final decree should be rendered.

7. That there is no proof in the record that the lot described in the lease is identical with lot 14.

8. Because there is no proof in the record that appellees ever acquired the interest of Albert and Henry Belding in said lot.

9. Because there is no proof in the record that Rugg bought with notice of plaintiff's claim; and because there is proof that he bought without such notice, and when plaintiffs were publicly proclaiming that they were content with the awards made.

10. Because there is no proof in the record on which a decree for plaintiffs can be based.

11. Defendant prays for decree for one-half of the costs of transcript used on the appeal.

12. No judgment for costs should be rendered until the cause is finally disposed of.

Your petitioners farther show that said petitions and exceptions were submitted to said Circuit Court, held solely by said Henry C. Caldwell, one of the judges of said Circuit Court, on the 7th day of January, 1893, when the court made an order which declared that the court was "of opinion that said exceptions are well taken, and that the defendant herein should be allowed, if he so elects, to take further testimony in support of his said exceptions by way of defense to the title to the land in controversy, and that this cause should be set down upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;" whereupon said order farther declared "that said exceptions be sustained, and that said decree prepared as aforesaid be not entered; but [that] as the plaintiffs announced their purpose to apply to the Supreme Court of the United States for a writ of mandamus to compel the entry of said decree prepared by the plaintiffs' solicitors, and the court being willing to expedite said proceeding, it is further ordered that said proposed decree and the petition of the plaintiffs for the entry thereof be made a part of the record herein," and that the petition for a writ of possession aforesaid be overruled; to which rulings your petitioners at the time excepted, and asked that their exceptions be noted on the record, which was accordingly done.

All of which records and proceedings from the said

mandate to said last named order, which is the last order made in said cause, will appear by a duly certified copy thereof hereto annexed, marked Exhibit A, and made part hereof.

It appearing therefore manifest that the said Circuit Court, held by said Henry C. Caldwell, has erred in refusing to obey the mandate of this court, your petitioners therefore pray that this court may issue a writ of mandamus to said Henry C. Caldwell as judge of said Circuit Court, commanding him as such judge to grant the petition for a decree filed by your petitioners in said cause, and to order the issue of a writ of possession as prayed by them, or to make such other orders and decrees as may be deemed proper herein in carrying out the decree heretofore rendered in this cause by this court; and for all other proper relief, and your petitioners will ever pray.

W. M. Rose
M. B. Rose
for Petitioners

STATE OF ARKANSAS,
County of Garland.

On this day came before me, a Notary Public in and for said county and state, William H. Gaines, to me personally well known, and made oath that the matters stated in the foregoing petition are true. W. H. GAINES.

Sworn to and subscribed before me this day.

Witness my hand and seal of office at the city of Hot Springs, on this 16th day of January, 1893.

J. W. Garrigus
Notary Public.

EXHIBIT A,

TO THE FOREGOING PETITION.

Attest:

U. M. ROSE, G. B. ROSE,

For Petitioners.

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UNITED STATES OF AMERICA,

WESTERN DIVISION OF THE

EASTERN DISTRICT OF ARKANSAS.

BE IT REMEMBERED, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the eleventh day of April, Anno Domini, One Thousand eight hundred and ninety-two, at the United States Court room, in the City of Little Rock, Arkansas, the Honorable John A. Williams, District Judge, presiding and holding said court, the following proceedings were had, to-wit: On June 1, 1892,

Wm. H. Gaines, *et al.*,

v. [No. 644.]

D. C. Rugg.

Now, on this day came said plaintiffs, by U. M. & G. B. Rose, Esqs., their solicitors, and by leave of the court, they file the mandate of the Supreme Court herein, which is in words as follows:

United States of America—ss.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the Circuit Court
[SEAL.] of the United States for the Eastern District of Arkansas:

GREETING—

Whereas, Lately in the Circuit Court of the United States for the Eastern District of Arkansas, before you, or some of you, in the cause between William H. Gaines and Maria Gaines, his wife, complainants, and D. C. Rugg and Geo. W. Barnes, defendants, wherein the decree of the said Circuit Court, entered in said cause on the 11th day of November, A. D. 1887, is in the following words, viz:

"Now, on this day came the said plaintiffs by their solicitors, M. W. Benjamin and R. G. Davies, and also comes the said defendant, D. C. Rugg, by G. W. Murphy, Esq., his solicitor, and the special master having heretofore filed his report herein, and this cause now coming on for hearing and the court having heard the argument of counsel and being now sufficiently advised as to the further decree to render herein, It is ordered, adjudged and decreed that all of the

exceptions of the defendant to the master's report be, and the same are overruled; and thereupon the court finds and states the account between the plaintiffs and defendants as follows:

To amount due said plaintiffs for rent, according to the terms of the lease from the date of award to the date of the filing of the bill in this case and interest, ten hundred and sixteen dollars and thirty-eight cents.

To amount due him since that date and until the filing of the master's report, the rental value of the property and interest, eight hundred and eleven dollars and sixty-eight cents. To amount rent to date this decree, two hundred and forty-five dollars; amounting in the aggregate to the sum of two thousand and seventy-three dollars and six cents.

By amount due the defendant for taxes paid and interest, two hundred and ninety-eight dollars.

By amount of purchase money paid by him to Government for said lot and interest, one hundred and fifty-eight dollars and forty cents.

By present value of the improvements, five hundred dollars; which said sums amount in the aggregate to nine hundred and fifty-six dollars and forty cents, which, taken from two thousand and seventy-three dollars and six cents, as above, leaves the sum of eleven hundred and sixteen dollars and sixty cents, which the court finds to be the balance now due the plaintiffs.

It is therefore ordered, adjudged and decreed that said plaintiffs do have and recover from said defendant, D. C. Rugg, said amount, eleven hundred and sixteen dollars and

sixty cents and all costs of this suit, and that he have execution therefor.

And it is further ordered and decreed, that the said plaintiffs do have and recover from said defendants the possession of said lot fourteen, in block seventy-seven, in the Hot Springs reservation, Garland County, Arkansas; and that a writ of possession issue; and serving a copy of this decree shall be the writ.

It is further ordered that N. W. Cox be allowed the sum of one hundred dollars for his services as special master herein; and the defendant prays an appeal to the Supreme Court, which is granted; and it is ordered that upon his executing and filing a bond within the time and conditioned as prescribed by law, in the sum of thirty-six hundred and sixteen dollars and sixty-six cents and a bond for costs for two hundred and fifty dollars, with good, approved security, the decree be superseded pending said appeal," as by the inspection of the transcript of the record of the Circuit Court, which was brought into the Supreme Court of the United States by virtue of an appeal taken by D. C. Rugg agreeably to the Act of Congress in such case made and provided fully and at large appear; and,

Whereas, At the present term of October, A. D. 1891, of said Supreme Court, the death of Maria Gaines, one of the appellees in this cause, having been suggested, it was ordered that Albert B. Gaines, executor, and William H. Gaines, Jr., Fannie G. Williamson, Louisa G. Blasdell, Abner L. Gaines, Augusta Stitt, Mary P. Gaines and Albert R.

Gaines, sole devisees and legatees of the said Maria Gaines, deceased, be made parties appellees herein.

And whereas, in the present term of October in the year of our Lord one thousand eight hundred and ninety-one, the said cause came on to be heard before the said Supreme Court on the said transcript of record and was argued by counsel; on consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, each party to pay one-half of the costs in this court.

And it is further ordered that this cause be, and the same is hereby remanded to the said Circuit Court for further proceedings to be had therein in conformity with the opinion of this court.

MAY 2, 1892.

You therefore are hereby commanded that such further proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of said Supreme Court, the 24th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Filed, June 1, 1892.

RALPH L. GOODRICH, Clerk.

United States Circuit Court for the Eastern District of Arkansas, Western Division.

William H. Gaines et al.

v.

D. C. Rugg.

Come said plaintiffs, and present here the mandate of the Supreme Court of the United States in this cause, and pray that the same may be filed and that a decree may be entered on said mandate in accordance with the draft hereto annexed. U. M. & G. B. ROSE,

For Plaintiffs.

William H. Gaines, Albert B. Gaines, as Executor of the last Will and Testament of Maria Gaines, deceased, William H. Gaines, Jr., Fannie G. Williamson, Louisa G. Blasdell, Augusta Stitt, Mary P. Gaines and Albert B. Gaines.

v.

D. C. Rugg.

Now on this day came the said plaintiffs by U. M. & G. B. Rose, their solicitors, and by leave of the court having filed here the mandate of the Supreme Court of the United States: Wherefore it is now on their motion ordered, considered and decreed by the court that all the right, title, claim and interest of said defendants in and to lot 14, in block 77, in the city of Hot Springs, be and the same is divested out of them and that the same be vested in said plaintiffs, and that the account between said plaintiffs and said defendants be stated in accordance with the directions contained in said

mandate, and that in taking said account said defendants be charged with the rental value of said lot from the 23rd day of May, 1884, or during such portions of said time as they may have kept said plaintiffs out of the possession thereof down to this date, with interest on the same from the end of each year at the rate of six per centum per annum, no additional rent however to be charged to said defendants by reason of any improvements placed on said lot by said defendants; and that said plaintiffs be charged with all taxes paid by said defendants on said lots from the 23rd day of May, 1884, with interest on the same from the time of such payments until this date, at the rate of six per centum per annum, also with the present value of all improvements placed by said defendants on said lots as the same may appear at this date; also the sum of one hundred and twenty dollars paid by said defendant to the United States for said lot, with interest on the same at the rate of six per centum per annum from January 1, 1882, until this date; and that said defendants pay all the costs by plaintiffs paid out and expended in this cause in this court, and that they have execution therefor as at law, and the special master herein is now directed to proceed to state an account between said parties according to the terms of this decree, and to that end he shall take testimony in writing of all witnesses produced, and shall report the same with all his proceedings and his findings herein to this court at the next term thereof.

Filed, June 1, 1892.

RALPH L. GOODRICH, Clerk.

United States Circuit Court for the Eastern District of Arkansas, Western Division.

William H. Gaines et al.

v.

D. C. Rugg.

Come the said plaintiffs and pray the court to issue a writ of possession to the marshal of this district, commanding him to put them in possession of the lands mentioned in the decree herein.

U. M. & G. B. ROSE.

Filed, December 21, 1892.

RALPH L. GOODRICH, Clerk.

In the Circuit Court of the United States, Eastern District of Arkansas, Western Division.

William H. Gaines et al.

v.

D. C. Rugg.

Exceptions to the proposed decree filed in the above entitled cause, by Wm. H. Gaines et al. on the 1st day of June, 1892.

Now comes D. C. Rugg, plaintiff in error in the above entitled cause, and defendant in this honorable court, and excepts to the form and effect of the decree submitted for entry herein, and for cause of objection states:

1. That said proposed decree is not in accordance with the terms and direction of the mandate filed herein, in this, that said mandate directs this honorable court to enter a decree reversing the former decrees of this court, entered in said cause, and commands, "That such further proceedings

be had in said cause in conformity with the opinion and decree of this court. as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding," whereas the proposed decree does not, in terms or by implication, reverse any of said decrees, as required by said mandate, but on the contrary, in legal effect, affirms the decrees which the Supreme Court directs this court to reverse.

2. For further objection to the decree proposed by the appellee, appellant states that it appears from the proof in the record, the Appellees immediately after the award, made by the Hot Springs Commission to Geo. W. Barnes, openly and publicly declared, and continued to so declare, until long after the purchase by appellant, they would never make further claim to said lot, or claim antagonistic to the awards made by said commission; that they at all times prior to the institution of this suit, expressed themselves satisfied with said awards and content with what said commissioners had awarded them; that prior to the 12th of January, 1880, (the last of the awards being made in December, 1879), Albert B. Gaines, one of the plaintiffs herein, a son of William H. and Maria Gaines, and who held a power of attorney from William H. Gaines: "To do any act for me, and in my name, necessary to be done in order to secure title from the United States government to said premises, to the same effect as if personally present. My said attorney is hereby authorized to perform all such matters as he may deem necessary for the purpose of carrying out the objects herein mentioned," etc., in connection with Fannie G. Williamson,

Augusta Stitt, and Mary P. Gaines, all of whom are now plaintiffs in this suit, signed a petition or memorial to the Congress of the United States, wherein, among other things, is recited:

"Your memorialists, with entire unanimity, certify to your honorable body that the citizens of Hot Springs have accepted the decision of the commissioners, and the certificates based thereon, in good faith as final and conclusive as to all questions of title. They intend to uphold this settlement."

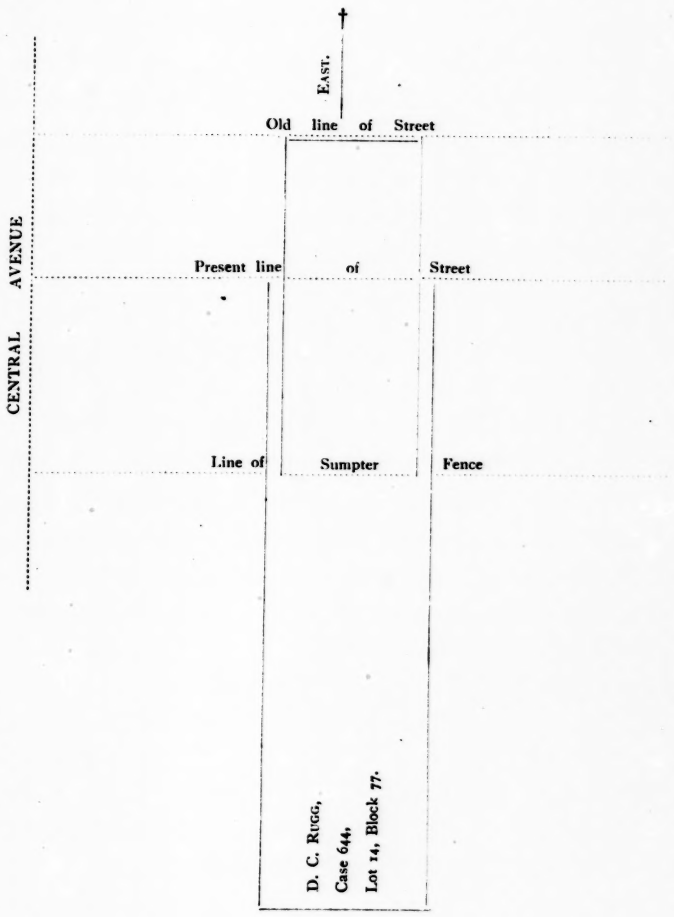
That said Albert B. Gaines, acting under the power of attorney aforesaid, to prevent Congress from passing any act giving an appeal, or allowing the awards made by the commissioners to be reviewed or modified (a bill to that effect being then pending before Congress), under the authority of the power of attorney aforesaid, and for the purpose of preventing the award made of the lot in controversy from being disturbed, as well as the awards made to William H. and Maria Gaines, went to the City of Washington, D. C., and employed counsel to appear before the proper committees to present arguments and reasons why said awards should not be disturbed, but on the contrary affirmed; that the counsel so employed as aforesaid did appear under their employment as aforesaid, and make argument against Congress authorizing an appeal or review of said awards; that by reason of the said arguments the petition aforesaid, which was signed by ninety-five per cent of the persons to whom awards had been made, and the assistance of other parties similarly situated, that is, having awards, Congress was induced to refrain

from passing an act granting an appeal or review, and in lieu thereof, passed an act that in all things confirmed the awards made by said commission; that thereafter, the plaintiffs, when spoken to upon the subject of titles to property at Hot Springs, openly and publicly proclaimed that the titles to property at Hot Springs were finally and forever settled; that they thereafter advised persons to purchase lots which they (plaintiffs) had claimed before the Hot Springs commission, that had been awarded to others; that relying on the aforesaid assertions and disclaimers, said Rugg purchased said lot; that for a period of more than four years they thus stood by, seeing persons buying, selling and improving the lots to which they now make claim, without in any manner retracting the public statements aforesaid, or making known that they claimed any equity or equities therein, and appellant submits that such conduct amounts to an estoppel in equity, as well as gross laches, which ought to prevent a recovery on the part of the plaintiffs; and if not, such negligence and laches as would entitle the appellant, if decree should be for plaintiffs, to a decree for the purchase money paid to his vendor for the lot, and the United States, as well as for improvements, taxes and assessments, with interest from the date of each payment.

3. That the claim and demands of said Wm. H. Gaines et al. is based upon and arises out of the relation of landlord and tenant to a certain tract or parcel of land, commonly known as the Belding claim, more fully mentioned and described in a certain lease executed on the 17th of May, 1875, by and between the said Wm. H. Gaines and one

Waldron, all of which will more fully appear from the pleadings, exhibits and proof on file in this case. That the tract or parcel of land so leased and claimed as aforesaid is described as follows, to-wit: "Beginning at the southeast corner of McGinnis' lease, sixteen feet south of the New Valley house, on the west side of the street, near the south end of Hot Springs valley, run thence west at right angles with the street to the Sumpter fence, thence south twenty feet, thence east to the street, thence north along the street twenty feet to the place of beginning." That the street alluded to in said description was then known as Valley street; that the distance from the west line of said street to the Sumpter fence, at the time of the execution of said lease, was about forty-five feet, thus making the leased premises a tract or parcel of land with a frontage of twenty feet on said street, with a depth of forty-five feet. That the Hot Springs commission, appointed under the various acts of Congress as said commission, were authorized and empowered to do, for the purpose of widening and straightening said Valley street, took from said leased property a strip of ground abutting on Valley street, about twenty-five feet in depth and twenty feet in width, so that there now only remains of said leased tract, on the west side of said Valley street, a tract or parcel of land covered by said lease, with a frontage of twenty feet and a depth of twenty feet. That lot 14, block 77, as laid out by the Hot Springs commission, has a frontage of twenty-one feet and a depth of ninety feet. That as to seventy feet of the west or rear end of said lot, it is composed of land at the time of the execution of the lease aforesaid was within the

enclosure and possession of the Sumpters, and never at any time in the possession or under the control of said Gaines or his co-plaintiffs or any of them. That as to the residue of said lots, that is, that portion covered by the lease, it consists of a tract or parcel of land having a frontage of twenty feet on Central avenue, with a depth of twenty feet. That for the purpose of showing the status and location of the land covered by the lease originally, and that which was left after the widening and straightening of Valley street, (now known as Central avenue), defendant furnishes a diagram or plat, whereon is shown the land taken from the Sumpter tract—that which was taken in widening and straightening the street and that which remains. That said plat is drawn on a scale of four hundred feet to the inch. The purple lines show the lots as laid out by the Hot Springs commission. The red lines show the location of the land described in the lease, and the dotted purple lines show the location of the Sumpter fence.


EAST.
Old line of Street
CENTRAL AVENUE
Present line of Street
Line of Sumpter Fence
D. C. Rugg,
Case 644,
Lot 14, Block 77.

That all that remains of the leased property is a tract of land with a frontage of twenty feet, on Central avenue, with a depth of twenty feet; whereas the said lot has a depth of ninety feet with a frontage of twenty-one feet; and defendant submits it would be inequitable and unjust to extend the terms of said decree filed by the appellees or the relations of landlord and tenant beyond the leased estate now in esse, and to land covered by the lease, and to which and over which the plaintiffs, Gaines and wife, nor the Beldings, ever at any time had possession or control of.

4. For further objection to the proposed decree, appellants state that there were four heirs of Ludovicus Belding, deceased, under whom the appellees claim, to-wit: George, Henry, Albert and Maria, with the last named of whom William H. Gaines intermarried. That there is no proof in the records that the appellees ever became possessed of the share or interest of the said Henry or Albert Belding, either by conveyance from them or any person claiming through or under them, and plaintiff submits that if the appellees shou'd finally be found entitled to a decree, that the decree should be limited and confined to such interest only as they acquired by conveyance from the Belding heirs, to-wit: the interest of Maria Gaines and George Belding.

5. That one of the defences relied upon by the appellant in this cause, at the hearing in which the former decrees were rendered, was that he was a purchaser for full value from a person to whom the Hot Springs commission had awarded the lot in controversy, without notice of the claim or contention of the appellees, and exhibited a quitclaim deed

showing such conveyance and purchase in good faith and as evidence of his title. That this honorable court was of the opinion at the former hearing of this cause that one holding under a quitclaim deed could not be regarded as a bona fide purchaser for value without notice, and that such a deed was not sufficient to put the appellees to proof or notice. That one holding under a quitclaim deed could not avail himself of such a defence. That the Supreme Court of the United States, at the October term, 1891, (since the decision and ruling of this honorable court as aforesaid), has held, in the case of McDonald vs. Belding, that the question of whether one was a bona fide purchaser for value without notice was one that was not to be determined by a mere inspection of the muniments of title, and that one could as well be a bona fide purchaser for value without notice under a deed of quit-claim as one of warranty. That such a question was one to be settled by proof. Appellant states that there is no proof in the record showing that appellant had notice of the claim of the appellees, and now denies, as is already denied by answer, that he had such notice, and submits that no decree ought to be rendered on the mandate herein in favor of appellees, as to do so would not be "according to right and justice and the laws of the United States," in the absence of proof that appellants had such notice as is averred in the bill of complaint.

6. Defendant submits that in the absence of proof as to the identity of the property described in the lease, with that of lot 14 in block 77, no final decree should be rendered in favor of the appllees until this court is fully advised of the

extent of the leased property now in esse—its exact location, and what portion, if any, of the property described in the lease constitutes a part or parcel of lot 14 aforesaid.

7. Appellant objects to the rendition of the proposed decree, offered by the appellees, because there is no proof in the record showing that the property described in the lease, under which appellees claim, is identical with lot 14 in block 77.

8. Appellant objects to the rendition of the proposed decree offered by the appellees because there is no proof in the record showing that the appellees ever at any time acquired the interest of Albert and Henry Belding to the claim of Ludovicus Belding deceased.

9. Appellant objects to the rendition of the proposed decree offered by the appellees, because there is no proof in the record showing that appellant had notice of the lease described in the bill or of the pretended equity of the appellees at the date of purchase, and for the further reason that it appears from the proof in the record that appellant purchased said lot, paying full value therefor, without knowledge of the appellees' claim, and at a time when the appellees publicly proclaimed they were content with the awards of the commission, and would not seek to disturb its findings or awards.

10. Appellant objects to the rendition of the decree proposed by the appellees, because there is no proof in the record on which to base a decree in favor of the appellees.

11. Appellant prays judgment or decree against the appellees for $————, under section three of rule

twenty-four, for one-half the costs of the transcript on the appeal to the Supreme Court.

12. Appellant submits that no judgment or decree should be rendered in favor of the appellees for costs until this cause is finally disposed of, and when said decree is rendered, if rendered at all, the rule adopted by the Supreme Court of the United States, should be followed by this court; that is, each party, in case the judgment or decree is in favor of the appellees, to pay one-half the costs.

JOHN MCCLURE,
Solicitor for Defendant.

Filed January 6, 1893.

RALPH L. GOODRICH, Clerk.

UNITED STATES OF AMERICA.
WESTERN DIVISION OF THE
EASTERN DISTRICT OF ARKANSAS.

BE IT REMEMBERED, That at a Circuit Court of the United States of America, in and for the Western Division of the Eastern District of Arkansas, begun and holden on Monday, the 24th day of October, Anno Domini, One thousand, eight hundred and ninety-two, at the United States court room, in the city of Little Rock, Arkansas, the following proceedings were had, to-wit:

Proceedings before the Honorable Henry C. Caldwell, Circuit Judge, on January 7, 1893.

William H. Gaines, Albert B. Gaines, Executor, William H. Gaines, Jr., Fannie G. Williamson, Louisa G. Blasdell, Abner L. Gaines, Augusta Stitt, Mary P. Gaines and Albert B. Gaines, sole Devisees and Legatees of Maria Gaines, Deceased.

v.

D. C. Rugg.

Now on this day came the plaintiffs by U. M. & G. B. Rose, Esqs., their solicitors, and also came said defendant by John McClure, Esq., his solicitor, and the exceptions filed by said defendant to the proposed decree on the mandate of the Supreme Court of the United States prepared and filed herein by the solicitors for the plaintiffs being now argued and submitted to the court, the court is of the opinion that said exceptions are well taken, and that the defendant herein should be allowed, if he so elects, to take farther testimony in support of his said exceptions, by way of defence to the title to the land in controversy, and that this cause should be set down upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands. It is therefore ordered that said exceptions be sustained, and that said decree prepared as aforesaid be not entered; but as the plaintiffs announce their purpose to apply to the Supreme Court of the United States for a writ of mandamus to compel the entry of said decree as prepared by the plaintiffs' solicitors, and the court being willing to expedite the said proposed proceeding, it is further ordered that said proposed decree and the petition of the plaintiffs for the entry thereof be made a part of the record herein. And it is further ordered that the

petition for writ of possession filed herein by said plaintiffs, be and the same is hereby overruled; and said plaintiffs except to said several rulings, and ask that their exceptions be noted of record, which is accordingly done.

[Signed.] HENRY C. CALDWELL,
Circuit Judge.

UNITED STATES OF AMERICA,
WESTERN DIVISION OF THE
EASTERN DISTRICT OF ARKANSAS.

I, Ralph L. Goodrich, Clerk of the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct and compared copy of the originals remaining of record in my office, of all records and proceedings in said cause occurring after the filing of the mandate of the Supreme Court of the United States in said cause.

In Witness Whereof, I have hereunto set my hand and the seal of said court, this ninth day of January, in the year of our Lord, one thousand eight hundred and ninety-three, and of the Independence of the United States of America, the one hundred and seventeenth.

[SEAL.]

RALPH L. GOODRICH, Clerk.